OFFICE OF THE CLERK,
SUPREME COURT OF THE UNITED STATES,
WASHINGTON, D.C.

MEMORANDUM. No. 636. Maney vs. United States of America.

This petition for certiorari is submitted with a motion for leave to proceed in forma pauperis. This record is incomplete since it contains none of the proceedings in the Circuit Court of Appeals other than the opinion of that court. A complete certified record has been sent to the Chief Justice.

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PETITION OF APPELLEE BELOW FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Supreme Court of the United States

October Term, 1927.

No. .....

ANNA MARIE MANEY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

Sirs:—

PLEASE TAKE NOTICE that upon the annexed petition of ANNA MARIE MANEY and a certified copy of the entire transcript of the record of this cause filed with the Clerk of this Court, and also the brief of the petitioner hereto annexed to be submitted on the presentation of the petition, an application will be made to the Supreme Court of the United States for a writ of certiorari to be directed to the United States Circuit Court of Appeals for the Seventh Circuit, wherein the record is now lodged to review the deter-

mination of said court rendered June 16, 1927, from which a rehearing was denied September 22, 1927, reversing the judgment of the United States District Court for the Eastern District of Wisconsin rendered April 6, 1926, the latter judgment dismissing the Government's complaint.

Dated, Milwaukee, Wis., November 30, 1927.

Yours, etc.

BRUNO V. BITKER,
Counsel for Petitioner.
Office and Post Office Address:
120 East Wisconsin Avenue,
Milwaukee, Wisconsin.

EDWIN S. MACK,
LOUIS MARSHALL,
Of Counsel.

To:

LEVI H. BANCROFT,
United States Attorney for the
Eastern District of Wisconsin,
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Milwaukee, Wisconsin.

Hon. JOHN G. SARGENT,
Attorney General of the United States,
Washington, D. C.

PETITION OF APPELLEE BELOW FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Supreme Court of the United States

October Term, 1927.

No. .....

ANNA MARIE MANEY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner, Anna Marie Maney, prays for a writ of certiorari to review the determination by the Circuit Court of Appeals for the Second Circuit, whereby the judgment of the District Court for the Eastern District of Wisconsin in this matter was reversed, in a decision presenting questions of law which because of their great importance should be settled by this Court and which is in conflict with decisions of other Circuit Courts involving the same principles and in which decision questions have been decided in a way probably in conflict with applicable decisions of this Court.

And the petitioner respectfully shows:

First: That she is a resident of the City of Milwaukee, County of Milwaukee, State of Wisconsin, within the judicial district of the District Court for the Eastern District of Wisconsin.

Second: That in June, 1925, the government instituted an action in said District Court for cancellation of a certificate of naturalization granted this petitioner February 11, 1924, which said action was decided adversely to the government (13 F. (2d) 662); that an appeal was then taken to said Circuit Court of Appeals and thereafter said Circuit Court rendered an opinion reversing the decree of said District Court, that said opinion was dissented from by the Senior Circuit Judge, Alschuler, in a written dissenting opinion (21 F. (2d) 28).

Third: That thereafter a timely petition for rehearing was made to and considered by said Circuit Court and denied on September 22, 1927.

Fourth: That the material facts, briefly, are as follows: The Naturalization Act requires the attachment of an "arrival certificate" to the application for naturalization; the application in question was filed November 13, 1923, at which date the arrival certificate had not been received by the applicant or by the Clerk of the District Court from the Naturalization Department of the government; on December 3, 1923, however, the certificate was mailed by the District Director of Naturalization to the Clerk and filed by the

latter. The application, having been duly docketed and notice thereof given as required by law, took its place upon the regular calendar for naturalization hearings and came on for hearing February 11, 1924.

At the time of the hearing, the District Court had before it the application, the applicant, the necessary witnesses, as well as the certificate of arrival.

The Assistant Chief Naturalization Examiner appearing for the government under Section 11 objected to the granting of the application, upon the sole ground that the arrival certificate had not been actually attached to the application November 13, 1923. The Court, being advised of the facts, ordered the attachment of the "arrival certificate" to the application, nunc pro tunc as of the date of filing the petition, denied the government's motion and granted a certificate of naturalization to the applicant, the petitioner herein.

No appeal was taken by the government from the decree of naturalization.

Fifth. That in June, 1925, the government instituted an independent action by virtue of Section 15 of the Naturalization Act to set aside the certificate of naturalization so granted, on the ground that the same had been "illegally procured," the alleged illegality consisting of the amendment of the application for naturalization by annexing thereto the certificate of arrival supplied by the District Director of Naturalization. On April 2, 1926, the District Court denied the petition of the government for a cancellation of the certificate and rendered an opinion in support of this conclusion (13 F. (2d) 662).

Sixth. That a certified copy of the transcript of record of the case accompanies this petition and copies of the opinions rendered below are hereto annexed.

Seventh. That your petitioner is advised by counsel and believes that this case presents questions of great importance which should be passed upon by this court because:

1. The decision seriously jeopardizes the rights of numerous naturalized citizens whose naturalization proceedings included orders by the trial court amending applications for naturalization so as to cure alleged procedural defects. The decision makes it possible to annul naturalization judgments at any time, by decrees rendered in later independent actions instituted by the government under Section 15 of the Act, despite the conceded qualifications of the persons affected, regardless of the absence of fraud in the proceedings, and though the amendments merely affect purely procedural matters and not matters of substance.

2. The decision tends to deprive the United States District Courts and other naturalization courts, numbering over 2280 throughout the country, of the right to act in a judicial capacity in passing upon naturalization petitions, of exercising the inherent power in their discretion of amending applications curing or waiving minor procedural requirements.

Eighth. That your petitioner is advised by counsel and believes that the decision of the Circuit Court of Appeals is in conflict with applicable decisions of this court in that

1. The decision of the lower court, in effect, makes the naturalization court an administrative functionary without the right to exercise judicial powers, especially that of amendment, whereas this Honorable Court has held in *Tutun vs. United States*, 270 U. S. 568, that the proceeding is judicial.

2. The decision apparently contemplates that under Section 15 of the Naturalization Act the government has the right to bring a separate action for cancellation of the certificate of naturalization for any reason or ground whatever, whether the defect be procedural or substantive, whereas this court has held in *Luria v. United States*, 231 U. S. 24, that Section 15 is not intended to "make any act fraudulent or illegal that was honest and legal when done," but is solely for the purpose of setting aside "of merely colorable letters of citizenship to which their possessors never were lawfully entitled."

Whereas the decision of the Circuit Court of Appeals holds that a procedural defect, properly reviewable by appeal from the decree of naturalization, may be reviewed under Section 15, this Court has indicated in the *Tutun* case that the "remedy afforded to the government by Section 15 is narrower in scope than the review commonly afforded by appellate courts."

3. The decision of the Circuit Court of Appeals apparently contemplates that the granting of a decree of naturalization upon an amended application conforming with the facts existing at the time of the decree, or waiving or curing alleged procedural defects in the face of opposition by the government, from which decree no appeal has been taken, does not con-

stitute res judicata in an action brought under Section 15, whereas this Court has held in *United States v. Ness*, 245 U. S. 326, that "a decision on such minor questions, at least of a state court of naturalization, is, though clearly erroneous, conclusive even as against the United States if it enter an appearance under Section 11," and it is assumed that the same ruling would apply as to Federal Courts of naturalization.

Sixth: That your petitioner is advised by counsel and believes that the decision of the Circuit Court of Appeals announces a rule in conflict with the decisions of other circuit courts on the same matter in that the decision construes a defect in procedure, ordinarily reviewable by an appeal, as constituting illegality under Section 15, which is in conflict with decisions, among others, of the 3rd Circuit in *United States v. Richmond*, 7 F. (2d.) 28. The decision here in question on general principles is in conflict with the decison of the 9th Circuit in *United States v. Pandit*, 15 F. (2d.) 285, (from which latter decision this Court has denied a petition for writ of certiorari).

Seventh: That of the four judges who have heard and passed upon the case at bar, two have sustained the position of the government and two (the District Judge and the Senior Circuit Judge) have sustained this petitioner's contentions.

Eleventh: That in support of her contentions, your petitioner refers to the annexed brief which is made a part hereof.

WHEREFORE, your petitioner prays that a writ of certiorari may issue out of and under the seal of this Honorable Court, directed to the United States

Circuit Court of Appeals for the Seventh Circuit, commanding said Court to certify to this Court for review and determination, as provided in the Act of Congress known as the Judicial Code, and that your petitioner have such further relief in the premises as to this Court may seem appropriate and in conformity with said Act.

And your petitioner will ever pray, etc.

Dated, November 30, 1927.

ANNA MARIE MANEY

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Counsel for Petitioner.

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UNITED STATES OF AMERICA,
EASTERN DISTRICT OF WISCONSIN, ss
STATE OF WISCONSIN,
COUNTY OF MILWAUKEE.

ANNA MARIE MANEY, being duly sworn, says:

That she is the above named petitioner; that she has read over the foregoing petition and knows the contents thereof, and the facts as stated therein are true to the best of her knowledge, information and belief.

Anna Marie Maney

Subscribed and sworn to before me

this 2nd day of December, 1927.

(Seal)

Eileen E. Keck

Notary Public, Milwaukee County, Wisconsin.

My commission expires June 5, 1930

CERTIFICATE OF COUNSEL.

We, and each of us hereby certify that in our opinion the foregoing petition for a writ of certiorari is well founded in law.

BRUNO V. BITKER,
Counsel for Petitioner.

EDWIN S. MACK,
Of Counsel for Petitioner.

Supreme Court of the United States

October Term, 1923

No. ——

ANNA MARIE MANEY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITIONER'S BRIEF.

This case involves the following questions:

1. Whether the United States District Court in naturalization proceedings has the power, in the exercise of its judicial discretion, to permit to be supplied by amendment from the public records in the control of the Bureau of Naturalization, the omission from an application for naturalization so as to remedy a purely procedural matter.

2. Whether, after the government has appeared at the original hearing in the naturalization proceedings, pursuant to Section 11 of the Naturalization Act and has objected to the granting of a decree on a procedural ground, but has failed to appeal therefrom, it may, nevertheless, at any time thereafter file a bill under Section 15 of the Naturalization Act to set aside the decree of naturalization on the theory that the alleged procedural defect constitutes illegality.

ARGUMENT FOR ALLOWANCE OF WRIT OF CERTIORARI.

1. *THE IMPORTANCE OF THE QUESTIONS INVOLVED*

The importance of the questions involved may be best characterized in the language of the first paragraph of the dissenting opinion of Alschuler, Circuit Judge:

"The principle declared in this opinion is far reaching. Its general application would subject to such collateral attack every naturalization certificate granted since the act was adopted, however in good faith granted and received, where it is shown there was in the proceedings any departure from formal procedural statutory provisions, however trivial and inconsequential, and which by no possibility did or could affect the merits."

It is unquestioned that in the thousands of naturalization petitions which come before the courts annually, the courts, acting judicially, permit amendments of their allegations to conform with the actual facts and enter orders curing minor procedural errors or omissions. To permit a timely appeal by the government, based on such minor defects, is one thing, but it is an entirely different matter and one of the most serious consequence to the naturalized citizens of this country to rule that the government may at any time annul a decree of naturalization, free from fraud or any substantive shortcoming, because of a mere informality or irregularity in procedure from which no appeal was taken.

2. *THE CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.*

A. *A Naturalization Case is a Judicial Proceeding.*

The effect of the ruling of the majority in the Circuit Court of Appeals is to deny that the District Court acts judicially in passing upon naturalization cases, deciding rather that it acts in an administrative capacity only. The decision binds the District Court inexorably by the letter of the law and deprives the Court of power to determine judicially what procedural requirements are mandatory and what regulatory, or to decide whether a formal or procedural defect may be cured by amendment in conformity with the facts existing at the time of the hearing.

This is contrary to the spirit of

Johannessen v. United States, 225 U. S. 227
Tutun v. United States, 270 U. S. 568.

B. *The Trial Court Had Jurisdiction of Naturalization Petition in This Case.*

Further, the court below has apparently ruled that the District Court was without jurisdiction to hear and pass upon the application because "its preparation, filing and presentation shall be in exact accordance with the provisions of the act, and not otherwise, before there is any power in the court to act upon it."

The petition to be admitted to citizenship is a judicial proceeding under a federal statute. It, therefore, "presents a case within the jurisdiction of the court and this jurisdiction cannot be made to stand or fall upon the way the court may chance to decide an

issue as to the legal sufficiency of the facts alleged any more than upon the way it may decide as to the legal sufficiency of the facts proven."

Binderup v. Pathe Exch., 263 U. S. 291, 305.

"Whether a plaintiff seeking such relief has the requisite standing is a question going to the merits and its determination is an exercise of jurisdiction. If it be resolved against him, the appropriate decree is a dismissal for want of merits, not for want of jurisdiction."

General Investment Co. v. New York Central R. R. Co., 271 U. S. 228.

In short, if the applicant has presented a petition setting forth substantially a case within the jurisdiction of the court, as is a naturalization case, the District Court acquired jurisdiction. As was said in the *Johannessen* case:

"There is a statutory right in the alien to submit his petition and evidence to a court, to have that tribunal pass upon them, and, if the requisite facts are established, to receive the certificate. * * * *"

If the petition had been so unsubstantial as to be without color of merit, a jurisdictional question might arise. But in view of the cases cited in this court, the ruling of the Circuit Court of Appeals that the District Court was without power to act either way upon the application seems clearly erroneous.

3. *THE POWER OF THE GOVERNMENT UNDER SECTION 15.*

Section 15 permits an independent suit to set aside a decree of naturalization when it was "illegally procured." The qualifications of the applicant in this case are conceded by the government and the sole basis for the action is the technical defect referred to in the petition. It is this defect which the court below deems so unlawful as to mark the decree as having been "illegally procured," even though the Government, from its records, supplied the omitted arrival certificate which the District Court permitted to be annexed to the application.

This interpretation seems contrary to the spirit of *Luria v. United States*, 231 U. S. 9, in which it is said of Section 15:

(231 U. S. 24) "It does not make any act fraudulent or illegal that was honest and legal when done, imposes no penalties, and at most provides for the annulment, by appropriate judicial proceedings, of merely colorable letters of citizenship to which their possessors never were lawfully entitled."

Certainly it cannot be said that the District Court in exercising its discretion in passing upon the petitioner's application for citizenship was aiding her to obtain "ill gotten privileges," to use the phrase employed in *Johannessen v. United States*, 225 U. S. 227, at 242. So to hold is to exaggerate technicality and to disregard the truth.

4. THE PHRASE "ILLEGALLY PROCURED" DOES NOT APPLY TO PROCEDURAL IRREGULARITIES, OBJECTED TO AT THE ORIGINAL HEARING, BUT WHICH WERE NOT SOUGHT TO BE REVIEWED BY THE GOVERNMENT.

Mr. Justice Brandeis said in the *Tutun* case that:

> (270 U. S. 579) "The remedy afforded to the Government by Section 15 is narrower in scope than the review commonly afforded by the appellate courts. Moreover there is no corresponding provision which would afford to the applicant for citizenship an independent remedy for correcting errors committed in the District Court."

Again in the *Ness* case it was said:

> (245 U. S. 326) "Opposition to the granting of the petition for naturalization may prevail under Section 11 because of objections to the petitioner, or weight of evidence, or the credibility of witnesses, or mere irregularities in procedure. A decision on such minor questions, at least of a state court of naturalization, is, though clearly erroneous, conclusive even as against the United States, if it enter an appearance under Section 11."

In view of this language, to hold that an erroneous decision by a United States District Court on a question of procedure may be vacated by an independent action under Section 15, though binding on the government, if made in a State Court of naturalization, is, in effect, to hold that the latitude permitted by the *Ness* case to State Courts is greater than that permitted to Federal Courts of naturalization. In the language of the District Court in this case:

> (13 F. 2d, 666) "It would be absurd to endow the former (State Courts) with power to make a binding ruling on such matters and thereby withdraw from the situation the possibility of attack

under Section 15, but to reserve to the government the right to appear in the federal courts and instead of being bound by a decision therein on minor procedural matters to have liberty to proceed under Section 15 with the confidence of proving the guilty." (Parentheses ours)

5. *CONFLICT WITH DECISIONS OF OTHER CIRCUIT COURTS.*

The spirit of the prevailing opinion below appears not only in conflict with applicable decisions of this Court, but is, in principle, in conflict with decisions of the Circuit Courts of Appeals in other circuits.

Particular attention is called to *United States v. Richmond*, 17 F. (2) 28, (3rd C. C. A.), decided January 13, 1927, in which the recent decisions of this Court are reviewed and distinguished. There the Court in interpreting the phrase "illegally procured" and distinguishing between a certificate obtained by an affirmative unlawful act calling for the exercise of power under Section 15 and one obtained through an irregularity in procedure correctible on appeal, says:

(17 F. 2d) 31) "In the absence of an authoritative and controlling decision otherwise construing the term 'illegally procured,' we are inclined to the view that the decree of the Court in this case—'mistakingly made as it possibly was'—was not 'illegally procured' within the meaning of this statute, but was an irregularity in procedure correctible on appeal and presented a situation the statute was not meant to cover. Bearing on that question, we note that the United States, by virtue of Section 11 of the Act of 1906 was, by its representative, the naturalization officer, represented and in court when Richmond's petition was heard; that by that statute it was given the right

to be heard in opposition to the granting of any petition in naturalization; that it knew of the decree which was entered by the judge, and in pursuance of such decree and reciting it as its ground for doing so, it subsequently, by its naturalization bureau, issued to Richmond his and its certificate on such decree.

"The United States, being present and, therefore, a party with a litigant's rights in this naturalization proceeding, had the right to object to any error or irregularity and, if dissatisfied with the decree, to appeal therefrom."

Attention is called, too, to *United States v. Pandit*, 15 F. (2d) 285, (9th C. C. A.), in which that Court says, citing the *Tutun* case for its authority, that:

(15 F. (2d) 286) "It would scarcely be contended that the intent of the Congress was to grant a new trial except in ex parte cases where a final judgment is entered, when the law provides a remedy enforcible in the courts according to the regular course of legal procedure, and the remedy pursued and a status decreed. The Supreme Court in *Tutun v. United States* said:

> 'Whenever the law provides a remedy enforcible in the courts according to the regular course of legal procedure and that remedy is pursued, there arises a case within the meaning of the constitution whether the subject of the litigation be property or status. A petition for naturalization is clearly a proceeding of that character.'

The judgment being final in a proceeding according to the regular course of law, the giving of Section 15 unlimited scope would, in effect, grant a new trial at the government's election * * *

Courts often speak of erroneous rulings and always as meaning such as deviate from or are contrary to the law, but the term 'erroneous' is

never used by courts or law-writers as designating a corrupt or evil act.

By the same token erroneously granting naturalization to the defendant, the right to citizenship having distinctly been put in issue, the United States appearing and contesting, and the issue directly determined by a court of competent jurisdiction, the judgment not having been modified or reversed, cannot now be disputed."

In *United States v. Solomon (D. C.)*, 231 F. 462, and affirmed (C. C. A. 5th Cir.) 231 F. 928, the court says:

"Irregularity is not synonymous with illegality. Illegality denotes a radical defect, while irregularity is a want of adherence to some prescribed rule or mode of proceeding."

The cases cited from the Circuit Courts of Appeals are referred to not only as indicating the diversity of opinion among the circuits named, but because it is believed that the conclusions arrived at in other circuits are more in keeping with the spirit of the law than the decision in this case now sought to be reviewed, which represents an equal division among the four judges who have passed upon it.

It is respectfully submitted that the writ of certiorari prayed for should be granted.

BRUNO V. BITKER,
Counsel for Petitioner.

EDWIN S. MACK,
LOUIS MARSHALL,
Of Counsel.

APPENDIX

STATUTES INVOLVED

Naturalization Laws—Act of June 29, 1906.
(34 Stat. L., Part. 1, p. 596).

SECTION 4, Clause Second, Last Paragraph—

At the time of filing his petition there shall be filed with the clerk of the court a certificate from the Department of Labor, if the petitioner arrives in the United States after the passage of this act, stating the date, place, and manner of his arrival in the United States, and the declaration of intention of such petitioner, which certificate and declaration shall be attached to and made a part of said petition.

Sec. 11. That the United States shall have the right to appear before any court or courts exercising jurisdiction in naturalization proceedings for the purpose of cross-examining the petitioner and the witnesses produced in support of his petition concerning any matter touching or in any way affecting his right to admission to citizenship, and shall have the right to call witnesses, produce evidence, and be heard in opposition to the granting of any petition in naturalization proceedings.

Sec. 15. That it shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to insti-

tute proceedings in any court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of bringing the suit, for the purpose of setting aside and canceling the certificate of citizenship on the ground of fraud or on the ground that such certificate of citizenship was illegally procured. In any such proceedings the party holding the certificate of citizenship alleged to have been fraudulently or illegally procured shall have sixty days personal service in which to make answer to the petition of the United States; and if the holder of such certificate be absent from the United States or from the district in which he last had his residence, such notice shall be given by publication in the manner provided for the service of summons by publication or upon absentees by the laws of the State or the place where such suit is brought.

(First Paragraph Only)

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OPINIONS BELOW

The opinion of the Circuit Court of Appeals is reported in 21 F. 2d 28.

The opinion of the District Court for the Eastern District of Wisconsin is reported in 13 F. 2d 662.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Supreme Court of the United States

October Term, 1927.

No. 636.

ANNA MARIE MANEY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

JURISDICTION OF THIS COURT.

This matter is before this Court on a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit, to review the determination of said court rendered June 16, 1927 (R. 23 to 28), (from which a rehearing was denied September 22, 1927 (R. 34), reversing the judgment of the United States District Court for the Eastern District of Wis-

consin rendered April 6, 1926 (R. 6 to 17), the latter judgment dismissing the Government's suit for cancellation of the certificate of naturalization theretofore granted this petitioner, Anna Marie Mancy.

STATEMENT OF THE CASE.

The suit of the Government for cancellation is based solely on the ground that the "certificate of arrival" was not filed or physically attached to the petition for naturalization at the time said petition was filed, though subsequently supplied by the Government and attached to the petition by order of the trial court, and was present and attached to the petition before the trial court issued its decree of naturalization (R. 2).

The material facts, briefly, are stated in the course of Judge Geiger's opinion as follows:

> (R. 6 and 7) "The petition for naturalization was filed November 13, 1923, and upon it, as well as upon its supporting proofs, her qualifications and right to admission are conceded, save for the following:
>
> At the time of filing the petition she did not present nor file therewith the 'arrival' certificate specified in paragraph 2, Sec. 4, of the Naturalization Act (34 Stat. 596), viz.:
>
> 'At the time of filing his petition there shall be filed with the clerk of the court a certificate from the Department of Labor * * * stating the date, place and manner of his arrival in the United States, and the declaration of intention of such petitioner, which certificate and declaration shall be attached to and made part of said petition.'
>
> But, twenty days thereafter—that is, on December 3, 1923—such certificate was mailed to the

clerk by the district director of naturalization, acting, I assume, for the Department of Labor, and, it would seem, on behalf of, or at least in the interest of, the petitioner. The clerk received the certificate and filed it, certainly in the sense of taking it into official custody in connection with the petition previously filed as the initial step of a naturalization proceeding. He did not then physically attach it to the petition. But the latter was docketed, notice thereof given as required by law, and it took its place upon the regular calendar for hearings to be had February 11, 1924. On that day the Government appeared, filing a motion, viz.:

'This day came the naturalization examiner, Mr. H. L. Roethe, and moved the court to dismiss the above entitled petition, for the reason that the certificate of arrival was not attached to said petition at the time the petition was filed, or to have said petition marked 'spoiled' for the same reason.'

The motion thus made was overruled. (R. 8.)

At the time of the hearing, the District Court had before it the application, the applicant, the required number of witnesses, as well as the certificate of arrival.

No appeal was taken by the Government from the decree of naturalization.

One year and four months later, June, 1925, the Government instituted an independent action under Section 15 of the Naturalization Act, to set aside the certificate of naturalization so granted, on the ground that the same had been "illegally procured," the alleged illegality being that the certificate of arrival was not physically attached to the petition when filed, but was attached by order of the District Court at the time

of hearing of the petition. (R. 2.) On April 2, 1926, the District Court denied the petition of the Government for a cancellation of the certificate (R. 17) and rendered an opinion in support of this conclusion (13 F. (2d) 662). (R. 6 to 17, incl.)

An appeal was then taken by the Government to the Circuit Court of Appeals for the Seventh District (R. 17) and thereafter said Circuit Court rendered an opinion reversing the decree of said District Court (R. 23 to 28), from which opinion Judge Alschuler dissented in a written opinion (R. 28 to 32), (21 F. (2d) 28). A timely petition for rehearing was made to, considered by and denied by said Circuit Court on September 22, 1927 (R. 34).

A petition for writ of certiorari was then duly filed before this Court and allowed January 9, 1928 (R. 35).

STATUTES INVOLVED

Section 4 of the Naturalization Act of June 29, 1906, C. 3592, 34 Stat. p. 596 (U. S. C., Title 8, Sec. 380), so far as pertinent reads as follows:

> At the time of filing his petition there shall be filed with the clerk of the court a certificate from the Department of Labor, if the petitioner arrives in the United States after the passage of this act, stating the date, place, and manner of his arrival in the United States, and the declaration of intention of such petitioner, which certificate and declaration shall be attached to and made a part of said petition.

Section 11 of the same act reads as follows:

> That the United States shall have the right to appear before any court or courts exercising jurisdiction in naturalization proceedings for the

purpose of cross-examining the petitioner and the witnesses produced in support of his petition concerning any matter touching or in any way affecting his right to admission to citizenship, and shall have the right to call witnesses, produce evidence, and be heard in opposition to the granting of any petition in naturalization proceedings.

Section 15 of the same act (p. 601) as amended (U. S. C., Title 8, Sec. 405), so far as pertinent (first paragraph only) reads as follows:

That it shal be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of bringing the suit, for the purpose of setting aside and canceling the certificate of citizenship on the ground of fraud or on the ground that such certificate of citizenship was illegally procured. In any such proceedings the party holding the certificate of citizenship alleged to have been fraudulently or illegally procured shall have sixty days personal service in which to make answer to the petition of the United States; and if the holder of such certificate be absent from the United States or from the district in which he last had his residence, such notice shall be given by publication in the manner provided for the service of summons by publication or upon absentees by the laws of the State or the place where such suit is brought.

ARGUMENT.

I.

THE NATURE OF THE PROCEEDING AND THE COURTS' POWERS.

The prevailing opinion of the Circuit Court in this case having raised a question of the trial court's jurisdiction of the petition for naturalization, it is necessary to briefly discuss the nature of the proceedings. In passing upon this point, following a quotation from United States vs. Ginsberg, 243 U. S. 472, 473, the Circuit Court says:

> (R. 25) "This language seems to say that the form and contents of the alien's sworn petition to the Court and the manner of its preparation, filing and presentation, shall be in exact accordance with the provisions of the act and not otherwise, before there is any power in the Court to act upon it."

A. ***A Naturalization Case is a Judicial Proceeding of Which the United States District Courts Have Jurisdiction.***

The major premise of appellant's contention sustaining the District Court's jurisdiction is the rule that a naturalization case is a judicial proceeding, a proposition now established beyond question.

Johannessen vs. United States, 225 U. S. 227.
Tutun vs. United States, 270 U. S. 568.

Since a naturalization case is a judicial proceeding and by statute within the jurisdiction of the United States District Courts, the next question, in view of the contention of the Circuit Court of Appeals, is whether the trial court had jurisdiction of this particular petition. The principles generally applicable to questions of jurisdiction of the district courts are equally pertinent in order to ascertain whether the trial court had jurisdiction of this particular matter.

This Court has held in numerous cases that a complaint which substantially sets forth a claim or right within the jurisdiction of the District Court, whether that complaint is a model form of pleading, whether it be subject to motions to make more specific and definite, or whether it be subject to demurrer, unless it be frivolous and entirely lacking in substance, is within the jurisdiction of the District Court as such so long as it informs the Court that the relief sought is within that class of matters upon which the District Court has power to act.

Weiland vs. Pioneer Irrig. Co., 259 U. S. 498 (a 501.

Flanders vs. Coleman, 250 U. S. 223 (a 227.

Hart vs. Keith Exchange, 262 U. S. 271 (a 273

Lovell vs. Newman, 227 U. S. 412 (a 421.

Cases Before This Court Involving Cancellation of Certificates Have Not Denied the Jurisdiction of the District Courts.

In the leading cases before this Court involving the Naturalization Act and the right of the Government to institute independent actions under Section 15 for cancellation of certificates of naturalization illegally obtained, no contention has been made and no inference can be read into these decisions to the effect that this Court intended to hold that the trial courts were without jurisdiction to act in the proceedings. On the contrary, the language and spirit of the naturalization cases before this Court wherein judgments of cancellation have been sustained clearly indicate that the grounds for sustaining decrees of cancellation do not include any finding that the Naturalization Courts were without power to act, but, rather demonstrate that the rulings are solely because the District Courts granted certificates of naturalization to persons not entitled to receive the same for lack of competent proof, or because the petitioners were not within the class admissible to citizenship, or other substantive reasons.

We feel confident that a careful examination of these cases, from *Johannessen vs. United States*, 225 U. S. 227 through the late case to *Tutun vs. United States*, 270 U. S. 568, which are fully discussed subsequently in this brief, sustain appellant's contention that they were decided on the facts and not on the ground of jurisdiction.

B. *The Petition Having Set Forth a Substantial Claim Under a Federal Statute was a Case Within the Jurisdiction of the District Court.*

The jurisdiction in the case at bar is established by the general principles as laid down by this Court.

The case of *Binderup vs. Pathe Exchange*, 263 U. S. 291, involved an action under the anti-trust act based on a conspiracy in violation of the act. The Court's opinion clearly sets forth the proposition which this petitioner contends is the law of this case. The Court says:

> (263 U. S. 305) "Jurisdiction is the power to decide a judicial controversy and includes questions of law as well as of fact. A complaint setting forth a substantial claim under a federal statute presents a case within the jurisdiction of the Court as a Federal Court, and this jurisdiction cannot be made to stand or fall upon the way the Court may chance to decide an issue as to the legal sufficiency of the facts alleged any more than upon the way it may decide as to the legal sufficiency of the facts proven. Its decision either way, upon either question, is predicated upon the existence of jurisdiction, not upon the absence of it. Jurisdiction as distinguished from merits is wanting only where the claim set forth in the complaint is so unsubstantial as to be frivolous, or, in other words, is plainly without color of merit. (Cases cited.) In that event the claim of federal right under the statute is a mere pretense,

and, in effect, is no claim at all. Plainly there is no such want of substance asserted here."

Again in *General Investment Co. vs. New York Central Railroad Co.*, 271 U. S. 228, this court said in dealing with a similar question:

> (271 U. S. 230) "By jurisdiction we mean power to entertain the suit; consider the merits and render a binding decision thereon; and by merits we mean the various elements which enter into or qualify the plaintiff's right to the relief sought. There may be jurisdiction and yet an absence of merits * * *. Whether the plaintiff seeking such relief has the requisite standing is a question going to the merits and its determination is an exercise of jurisdiction. (Cases cited.) If it be resolved against him, the appropriate decree is a dismissal for want of merits, not for want of jurisdiction."
>
> See, too, *Swafford vs. Templeton*, 185 U. S. 487 (at 493, 494).

The application of these principles to the case at bar readily appear from a reading of the facts.

C. *The Duty of Passing Upon the Merits of Petition Presupposes Trial Court's Jurisdiction.*

If the United States District Court had no jurisdiction of the petition, then it follows that the Clerk of the Court had no right to accept the same for filing or to take the fee, and the trial court was without power to pass upon the merits of the application. It would have had before it what might be in the nature of a spurious paper. Clearly no such contention can

be maintained in view of what this Court has said in *Tutun vs. United States*, 270 U. S. 568, wherein it announced:

> (270 U. S. 578) "* * * there is a statutory right in the alien to submit his petition and evidence to a Court to have that tribunal pass upon them and, if the requisite facts are established, to receive the certificate. (See U. S. vs. Shanahan, 232 Fed. 169, 171.) * * * There is, of course, no 'right to naturalization unless all statutory requirements are complied with.' (Cases cited.) The applicant for citizenship, like other suitors who institute proceedings in a court of justice to secure the determination of an asserted right, must allege in his petition the fulfillment of all conditions upon the existence of which the alleged right is made dependent; and he must establish these allegations by competent evidence to the satisfaction of the Court. (Cases cited.) In passing upon the application, the Court exercises judicial judgment."

If the alien has a statutory right to submit his petition and evidence to a court and if he is bound to satisfy the court of his eligibility to citizenship, it follows that the trial court must have jurisdiction or it would be without power to pass upon the right to citizenship as prayed for in the petition for naturalization, which it is evidently required to do under the *Tutun* case.

A question of jurisdiction might be presented if the sole ground of invoking the jurisdiction of the District Court was, for example, diversity of citizenship and no such fact appeared on the face of the complaint, or, if this were a petition to prove a will or to quiet the title to lands and no federal question was set out in

the complaint; in such a case the Court could well say at the outset that the matter was one of which jurisdiction was denied to it and, therefore, could not be heard. But when there is presented to the United States District Court a petition of a matter of which the Court has jurisdiction under the Statutes and that fact appears on the face of the petition, then the trial court is empowered to hear the matter, and whether it finally grants or denies the petition goes to the merits of the case and not to the jurisdiction. For the trial court in its discretion to have ordered a judgment denying the petition for naturalization for the reason that it could not proceed to final action or enter a valid order of naturalization because of the particular procedural defect is one thing, but to hold that because of a failure to comply with a procedural requirement, it had no jurisdiction of the proceedings or right to pass upon the petition is entirely another matter.

D. *Since the Trial Court Had Jurisdiction It Possesses the Inherent Judicial Power of Curing Defects in Its Discretion.*

We submit that the power of amendment exists in naturalization proceedings. If it did not, as suggested by Judge Learned Hand in *In re Denny*, 240 Fed. Rep. 845, it would be the only form of legal proceeding in which it is not now allowed; just as it was declared in *Tutun vs. United States*, 270 U. S. 579, that "a denial

of a review in naturalization cases would engraft an exception upon an otherwise universal rule."

Section 954 of the United States Revised Statutes (Comp. St. Sec. 1591) confers the power of amendment in these comprehensive terms:

> "No summons, writ, declaration, return, process, judgment, or other proceedings in civil causes, in any court of the United States, shall be abated, arrested, quashed, or reversed for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect, or want of form, except those which, in cases of demurrer, the party demurring specially sets down, together with his demurrer, as the cause thereof; and such court shall amend every such defect and want of form, other than those which the party demurring so expresses; and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe."

See *Underwood Cont. Corp. vs. Davies*, 287 Fed. 776.

Rule 19 of the Equity Rules, as promulgated by this Court on November 12, 1912, provides:

> "The court may at any time in furtherance of justice, upon such terms as may be just, permit any process, proceeding, pleading or record to be amended or material supplemental matter to be set forth in an amended or supplemental pleading. The court, at every stage of the proceeding, must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

As further indicating the increasing liberality in Federal procedure in respect to amendment, attention is called to Section 274-a of the Judicial Code, enacted March 3, 1915, where it is provided that "the court shall order any amendments to the pleadings which may be necessary to conform them to the proper practice" in any case where it shall be found that a suit at law should have been brought in equity or that a suit in equity should have been brought at law.

The power of courts generally to cure defects and amend pleadings is too well established to require numerous citations of authorities. It is one of the fundamental discretionary rights of the courts.

Mexican Central Railway vs. Pinkney, 149 U. S. 194 @ 200.

In re Wight, 134 U. S. 135 @ 146.

The effect of the decision of the Circuit Court of Appeals upon the United States District Courts, however, is to deprive them of this inherent discretionary power. Under the ruling below, the trial courts are bound inexorably by the letter of the law and are without power to determine judicially what procedural requirements are mandatory and what regulatory, or to decide whether a formal or procedural defect may be cured by proper order in conformity with the facts existing at the time of the hearing. It makes courts of naturalization purely administrative or clerical functionaries. Unless there be some controlling basis therefor there appears no reason for holding that a United States District Court loses its discretionary judicial powers when acting in naturalization cases.

E. *Assuming that the Particular Defect Is Jurisdictional Rather Than Procedural, the Trial Court Has Power to Permit Jurisdictional Averments Through Amendments.*

The power of amendment has been frequently exercised in respect to jurisdictional matters. Thus, although a bill in equity must set forth the facts establishing the diversity of citizenship of the parties to a suit, it has been decided that failure to make proper allegations as to this essential jurisdictional fact may be supplied by amendment.

The decisions upon this subject are collated in the opinion of Mr. Justice Sanford, then District Judge, in *McEldowney vs. Card*, 193 Fed. Rep. 475, where he said:

> (193 Fed. Rep. 483) "Plainly, therefore, the declaration fails to aver the necessary diversity of citizenship of the parties at the time the suit was commenced so as to give this court jurisdiction of the controversy; and this defect in the pleadings is not supplied by any other portion of the record. The plaintiff, however, has asked leave to now amend his declaration by alleging that he is and was at the commencement of this suit a citizen of Kentucky and that the bankrupt is and was at the commencement of this suit a citizen of Kentucky, and in support of this application has tendered affidavits showing such citizenship of the plaintiff and a certified copy of the charter of the bankrupt showing it to be a Kentucky corporation. The authority of the trial court to permit, in the exercise of its discretion, amendments to the pleadings making necessary jurisdictional aver-

ments, even after a case has been remanded by the appellate court for want of such averments, is well settled. *Continental Ins. Co. vs. Rhoads*, 119 U. S. 237; *Menard vs. Coggan*, 121 U. S. 253; *Horne vs. Hammond Co.*, 155 U. S. 393; *Cooper vs. Newell*, 155 U. S. 532; *Tug River Co. vs. Brigel*, 67 Fed. 625; *Betzoldt vs. Insurance Co.*, 47 Fed. 705."

To the same effect is *Atchison, T. & S. F. Ry. vs. Gilliland*, 193 Fed. Rep. 608, 611.

In *Howard vs. de Cordova*, 177 U. S. 609, Mr. Justice White said:

> "Whilst the demurrer which the court below maintained was predicated solely on the fact that there was a want of jurisdiction because of the proceedings had in the State court, which the bill assailed for want of jurisdiction and fraud, we have observed that the citizenship of Smolenski is not averred in the bill. *This defect was curable by amendment, and it was not only within the power but the duty of the court, on its attention being called to the fact, to have allowed such an amendment to be made.*" (Italics supplied.)

See, too, *Kinney vs. Columbia Savings & Loan Assn.*, 191 U. S. 78.

The existence of diversity of citizenship as a condition of jurisdiction is a constitutional requirement. If the omission to show by proper allegation in the bill or declaration, the existence of such diversity of citizenship at the time of the commencement of the action, may be cured by amendment, it would seem to follow that the filing of the petitioner's arrival certificate with the clerk and its physical attachment to the petition by order of court before the decree of naturalization was

made, are equally sufficient to cure the defect in the petition as originally filed. This is especially true when one considers the facts set forth in the opinion of Judge Geiger, *supra*, the arrival certificate so attached having emanated from the Department of Labor, having been actually on file seventy days prior to the motion, and there being no suggestion that the Government had been impeded in its investigation into the merits of the application.

In *Norton vs. Larney*, 266 U. S. 511, the same course was pursued in a suit to quiet title to land allotted to the appellee as a citizen of the Creek National. There jurisdiction depended upon whether the suit arose under a law of the United States. The allegation of the facts on which jurisdiction depended was found to be insufficient to establish jurisdiction. No objection on jurisdictional grounds was raised in the District Court, but it was presented in the Circuit Court of Appeals, which held that the District Court had jurisdiction. When the case came to this Court the question of jurisdiction was again discussed. Mr. Justice Sutherland said:

> (266 U. S. 515) "It is quite true that the jurisdiction of a Federal court must affirmatively and distinctly appear and cannot be helped by presumptions or by argumentative inferences drawn from the pleadings. If it does not thus appear by the allegations of the bill of complaint, the trial court, upon having its attention called to the defect or upon discovering it, must dismiss the case, unless the jurisdictional facts be supplied by amendment. And where, as here, the jurisdictional facts appear upon the face of the record; where the very contention of the party interpos-

> ing the challenge to the jurisdiction is such as to plainly establish it, beyond the possibility of successful dispute, thus eliminating any element of surprise; and where the amendment must necessarily be allowed by the trial court, it would be mere ceremony to reverse the decree and remit the purely formal making of the amendment to the lower court. We shall, therefore, consider the bill as amended to conform to the facts of record and sustain the jurisdiction of the district court."

If the iron rule applied by the majority of the Judges constituting the Circuit Court of Appeals in this case were to be applied in naturalization proceedings, in which informality is the rule rather than the exception, where the applicants are especially unfamiliar with legal proceedings, and where, as pointed out by Judge Alschuler in the dissenting opinion herein (R. 29) (21 F. (2d), 31), it is manifest from the departmental rules and regulations made pursuant to the statute "that the alien is not expected to employ counsel to pilot him through the maze of statutory requirements and forms, departmental rules, and court proceedings," but that on the contrary "it is contemplated and required that the naturalization officers and the clerk extend their assistance to the alien in the preparation and presentation of the necessary papers," then much hardship and injustice is likely to result.

While the requirements of the statute must be observed, it is believed not to be essential that the petition as originally filed shall be free from defect so long as at the time of action by the court upon the petition the statutory requirements have been fully complied with and the Government will if it desires be accorded

an opportunity to conduct further investigation before the rendition of a decree of naturalization. *United States v. Doyle*, 179 Fed. Rep. 687.

II.

RIGHTS OF THE GOVERNMENT UPON A JUDGMENT OF NATURALIZATION.

Assuming then, as we must, that the particular petition now questioned, presented to the District Court a petition setting forth substantially a claim under a Federal Statute which the Court, therefore, had power to consider and pass upon, we come to the question of the right and the extent of the power of the Government to act upon a judgment of naturalization which has been granted upon a defect in procedure.

A. *Independent Suit Under Section 15 for Cancellation Must Be Grounded Upon Showing of Good Cause.*

In the event of an "illegally procured" certificate of naturalization, the Government has the right to institute an independent suit under Section 15 to set aside the certificate. The legality of this proceeding in a proper case is not questioned by appellant nor could it be doubted in the face of decisions of this Court.

United States vs. Ness, 245 U. S. 319.

The statute requires, as a prerequisite to such a suit, however, an "affidavit showing good cause there-

for." Does the affidavit in this case (R. 4) fulfill this requirement?

It is not pretended that there was any fraud in the proceedings for the petitioner's naturalization; nor is there any pretense that there was any misconduct in connection with such proceedings.

The case rests entirely on the claim that the certificate was "illegally procured." The only claim of illegality is that set forth in the affidavit of Chief Naturalization Examiner Schlottfeldt, which was made a part of the petition in this suit and which is the only showing attempted to be made on behalf of the Government of "good cause" for the institution of proceedings under Section 15.

That resolves itself to this: That the petition for naturalization was filed on November 13, 1923; that the "arrival certificate" was issued by the Department of Labor on November 24, 1923, was mailed on December 3, 1923, to the clerk of the court, by whom it was filed, and was attached to the petition, by order of the court, on February 11, 1924, prior to the granting of the order or decree of naturalization.

When the court acted, therefore, the "arrival certificate" was physically attached to the petition. The Government knew of it, because it was forwarded to the clerk by the Department of Labor. There is no pretense that the Government asked for further time to investigate, or that the petitioner did not in all respects conform strictly with the requirements of the statute. The existence of the jurisdictional facts was, therefore, necessarily conceded. The only objection raised was that, at the time the petition was filed, the "arrival certificate" was not attached to it, although

it was actually filed with the Clerk seventy days before the hearing, in which the Government's representative participated.

We contend that these facts do not constitute a showing of "good cause" that the certificate of citizenship was "illegally procured."

In *United States v. Salomon*, 231 Fed. Rep. 461, affd. 231 Fed. Rep. 928, it was shown that Section 6 of the Naturalization Act provided that final action on petitions for naturalization would be had only on stated days, to be fixed by rule of court, and that in no case should final action be had upon a petition until at least ninety days had elapsed after filing and posting of such petition. It was held that these provisions were directory, at least when applied to persons applying under special acts, and that it was within the discretion of the court to naturalize, without the posting of the petition, a person known to the judge to be patriotic, honorable and law-abiding. The failure to post was only an "irregularity" and not an "illegality."

In the opinion of Judge Walker in the Circuit Court of Appeals, *United States v. Salomon*, it was said:

> (231 Fed. 929) "The remedy given by the statute is the means provided for protecting the right of the Government to contest applications for naturalization and for excluding from citizenship those who, under the law, are not entitled to the privilege. The statute does not indicate a purpose to give the remedy when there has been no injury. The district attorneys are authorized to institute proceedings, only 'upon affidavit showing good cause therefor.' The affidavit upon which this suit was instituted amounted to nothing more

> than an assignment of error of law apparent upon the face of the naturalization proceedings. It states no fact from which it may be inferred that the ground for contesting the application existed, or that the result might have been different if all the requirements of the statute had been complied with in the naturalization proceedings. It cannot be supposed that it was in the contemplation of the lawmakers that an affidavit would be sufficient to put upon the district attorney the duty of instituting the proceeding provided for if it showed no more than this one discloses. We think it is manifest that it was intended that the required affidavit should state facts constituting 'good cause' for instituting the proceeding, and should do more than point out errors of law in the procedure which led up to the naturalization. The conclusion is that the statutory remedy would be perverted from its obvious purpose of safeguarding things of substance, if it is permitted to be successfully resorted to without any showing that the issue of the attacked certificate of citizenship might properly have been denied at the time it was granted, if the procedure had been a strict compliance with all statutory requirements."

In *United States v. Richmond*, 17 F. (2d) 28, (C. C. of A., 3rd Ct.), these cases are cited with approval, particularly the opinion of Judge Walker in *United States vs. Salomon* (231 Fed. 928) quoted, supra p. 21, in passing upon the question of the failure of the Government to make out a showing of "good cause" as the basis for a suit under Section 15.

B. *"Illegally Procured" Must Be Distinguished From Decree Based on Procedural Defect.*

That the remedy under Section 15 is lawful to set aside a certificate granted to one illegally in the sense

that such person was never entitled to receive the same is conceded for as this Court said in *Luria v. U. S.*, 231 U. S. 9,

> (231 U. S. 24) "It does not make any act fraudulent or illegal that was honest and legal when done, imposes no penalties, and at most provides for the annulment, by appropriate judicial proceedings, of merely colorable letters of citizenship to which their possessors never were lawfully entitled."

But the Government would stretch this interpretation of the extent of the remedy under Section 15 to include the class of cases, such as the one at bar, where the qualifications of the applicant are conceded by the Government and the sole basis for the action of cancellation is the technical, procedural defect caused by the Government's failure to supply the "certificate of arrival" at the time of filing of the petition for naturalization, though subsequently and 70 days prior to final hearing supplied by it to the Clerk of the District Court.

It is this defect which the Government deems so unlawful as to mark the judgment of naturalization as having been "illegally procured."

The Century Dictionary defines the word "Illegal" as follows:

> "Not legal, contrary to law, unlawful; illicit; as, an *illegal* act; *illegal* commerce. It naturally implies substantial contravention of law, as distinguished from mere irregularity in procedure, and from error in judicial decision."

"Procure" is defined in the Century Dictionary as follows:

> "2. To bring about by care and pains; effect; contrive and effect; induce; cause: as, he *procured* a law to be passed."

In 31 Corpus Juris, 242, 243, there are collated various decisions defining the words "illegally" and "illegality," which are summarized thus:

> "Illegality. That which is contrary to the principles of law as distinguished from mere rules of procedure. Illegality is properly predicable of radical defects only; it denotes a complete defect in the proceedings."
>
> "Illegally. Contrary to law; unlawfully. Phrases: 'Acting illegally,' 'illegally dealing,' 'illegally divert,' 'illegally or fraudulently conducted,' 'illegally procured,' 'illegally withheld'."

The juxtaposition of the words "fraud" and "illegally procured" in Section 15 as the two grounds upon which suit may be brought for the purpose of setting aside and cancelling a certificate of citizenship, indicates that illegal procurement was to be an act similar in character to "fraud." Something sinister or its equivalent was intended. The rule of *noscitur a sociis* should be applied.

Barlow v. United States, 7 Pet. 411.

Neal v. Clark, 95 U. S. 709.

Patten v. United States, 159 U. S. 509.

People v. N. Y. & M. R. R. Co., 84 N. Y. 565.

People v. Richards, 108 N. Y. 137.

The meaning of the phrase "illegally procured" is thus briefly referred to under this heading but is more

fully discussed in connection with the argument which follows this point.

C. *Government's Remedy Upon Judgment in Which Procedural Defect Has Occurred Is Through Appeal Only.*

Prior to the decision in *Tutun v. United States*, 270 U. S. 568, there may have been some doubt as to the right of appeal in naturalization cases. But since the decision in that case all doubts have been set at rest. While that decision does not attempt to draw a clear cut line between cases in which the Government has its remedy under Section 15, as pointed out in *United States v. Ness*, 245 U. S. 319, the *Tutun* case clearly indicates that every naturalization judgment sought to be attacked is not within the scope of Section 15 when the Court says:

> (270 U. S. 579) "The remedy afforded to the Government by Section 15 is narrower in scope than the review commonly afforded by the appellate courts. Moreover there is no corresponding provision which would afford to the applicant for citizenship an independent remedy for correcting errors committed in the District Court."

In keeping with the spirit of this quotation from the *Tutun* case as well as the quotation from *Luria vs. U. S.*, 231 U. S. 9, supra p. 23), a number of the Circuit Courts of Appeals have announced decisions interpreting the meaning of "illegally procured" and distinguishing between cases in which the Government has its remedy through independent suit and those in which it is limited to appeal only.

In *United States v. Richmond*, 17 F. (2d), 28, (3rd C. C. A.), the recent decisions of this Court are reviewed and distinguished. There the Court in interpreting the phrase "illegally procured" and distinguishing between a certificate obtained by an affirmative unlawful act calling for the exercise of power under Section 15 and one obtained through an irregularity in procedure correctible on appeal only says:

> (17 F. (2d) 30) "Now to the words 'procured,' 'illegally procured,' coupled in this statute with fraud, as it is, must be attributed the purpose of Congress to use those words in their commonly understood meaning, as evidencing a positive, affirmative act on the part of the procurer, and one of a sinister character. • • • And that these words meant something sinister, and the purpose of Congress so to use them, is evidenced by the legal authorities where, for example, in 2 Corpus Juris, 1126, commenting on the act, it is said: 'While there is some difference of opinion as to the meaning of the terms 'illegally procured,' the better rule seems to be that it imports a certificate issued without authority of law, and, in effect, false and spurious; not an error of law but subornation, or some other illegal means, to impose on the court.' Did Congress mean these words to apply to a case where there was no fraud, no improper or illegal act done by the applicant; to a situation where protection against irregularity was already provided for by the Government's right to appear, and, if wronged, to appeal; to a case where an applicant was, as Richmond admittedly was, both by the actual proofs and the testimony of himself and witness, qualified for citizenship, and where the alleged ground of cancellation was not anything done or procured by the applicant, but wholly the act and possible error of the judge?"
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(p. 31) "In the absence of an authoritative and controlling decision otherwise construing the term 'illegally procured,' we are inclined to the view that the decree of the Court in this case—mistakingly made as it possibly was—was not 'illegally procured' within the meaning of this statute, but was an irregularity in procedure correctible on appeal and presented a situation the statute was not meant to cover. Bearing on that question, we note that the United States, by virtue of Section 11 of the Act of 1906 was, by its representative, the naturalization officer, represented and in court when Richmond's petition was heard; that by that statute it was given the right to be heard in opposition to the granting of any petition in naturalization; that it knew of the decree which was entered by the judge, and in pursuance of such decree and reciting it as its ground for doing so, it subsequently, by its naturalization bureau, issued to Richmond his and its certificate on such decree.

"The United States, being present and, therefore, a party with a litigant's rights in this naturalization proceeding, had the right to object to any error or irregularity and, if disatisfied with the decree, to appeal therefrom."

Attention is called, too, to *United States v. Pandit*, 15 F. (2d) 285, (9th C. C. A.), in which that Court says:

(15 F. (2d) 286) "Courts often speak of erroneous rulings and always as meaning such as deviate from or are contrary to the law, but the terms 'erroneous' is never used by courts or law writers as designating a corrupt or evil act.

(P. 289) "By the same token erroneously granting naturalization to the defendant, the right to citizenship having distinctly been put in issue, the United States appearing and contesting, and the issue directly determined by a court of competent jurisdiction, the judgment not having been modified or reversed, cannot now be disputed."

In *United States v. Salomon (D. C.)*, 231 Fed. 461, and affirmed (C. C. A. 5th Cir.) 231 Fed. 928, the Court says:

> (231 Fed. 464) "Irregularity is not synonymous with illegality. Illegality denotes a radical defect, while irregularity is a want of adherence to some prescribed rule or mode of proceeding."

Again in *United States v. Svednik*, 19 F. (2d) 71 (3 C. C. A.), an action by the Government for cancellation of a certificate of naturalization brought under Section 15 the Court there says:

> (19 Fed. (2d) 71) "The underlying primary question here involved is whether the remedy of cancellation here sought could be availed of under the fifteenth section of the act of June, 1906, (Comp. St. Sec. 4374). Was the certificate, in the words of the said act, 'illegally procured'? (Quotation from the Richmond case, 17 F. (2d) 28, follows) * * * The question before the Court is one of fact and legal construction, namely, whether the absence of the applicant from the country with the intention of returning was a compliance with the statutory requirement of a continuous residence. *That question the naturalization judge held in favor of the applicant under the facts of the case. If he was mistaken, the remedy of the government which was represented at the hearing, was by appeal.*" (Italics and parenthesis ours.)

Reading these cases of the Circuit Courts in the light of the language of the cases in this Court, it follows that Section 15 applies only to cases where the applicant either fradulently imposed upon the Court or was not qualified for citizenship under the statutes or failed to comply with a substantive requirement of the statute, as in the *Ness* case (245 U. S. 319); but

clearly the remedy sought to be exercised in this case was not intended to permit the Government to institute an independent action at any time to annul a judgment of naturalization, free from fraud or any substantive shortcoming, because of mere informality or irregularity in procedure from which no appeal was taken.

To the same effect is the opinion of Judge Amidon in the well-considered case of *United States v. Lenore*, 207 Fed. Rep. 865, 869; also *United States v. Erickson*, 188 Fed. Rep. 747.

This Court must have had such distinction in mind when it said in the *Ness* case:

> (245 U. S. 325) "Opposition to the granting of a petition for naturalization may prevail (under Section 11), because of objections to the petitioner or weight of evidence, or the credibility of witnesses, or mere irregularities in procedure. A decision on such minor questions, at least of a State court of naturalization, is, though clearly erroneous, conclusive even as against the United States if it enter an appearance under Section 11."

And, for the reasons stated by Judge Geiger (R. 16), there would appear to be no purpose or ground for applying a different rule to United States Courts.

III.

IMPORTANCE OF PARTICULAR STATUTORY REQUIREMENT.

A. *Necessity of Filing Certificate of Arrival.*

That the filing of the "certificate of arrival" is "an essential pre-requisite to a valid order of naturalization," (*United States v. Ness*, 245 U. S. p. 322) is not questioned, following the ruling of the *Ness* case and the reasons therein assigned for so holding. But it is one thing to hold that the certificate of arrival must be present before an order of naturalization can issue and another thing to hold that the statutory requirement providing for filing at a particular time is just as important and essential as the certificate itself.

B. *Harmlessness of Trial Court's Order.*

As was said by Judge Geiger in his opinion

> (R. 7, 13 F. (2d) 662) "No suggestion was made that the Government had been impeded in exercising its right to appear or in its attempted examination of the merits, by any lapse either in filing or actual physical attachment."

And as Judge Alschuler stated in his dissenting opinion:

> (R. 7, 21 F. (2d) 31) "If question arose about the certificate, or the identity of the applicant with the person described in it, the Court would,

on the Government's suggestion, grant time for further investigation, and refusal to do so might as once stated by this Court, be an improper exercise of discretion. *United States vs. Doyle*, 179 Fed. 687."

In brief, the Government's rights were in no way affected and at the time of the order for judgment every requirement of the statute had been fulfilled. The petition, the petitioner, the necessary witnesses and the exclusive and conclusive proof of lawful entry, i. e., the "arrival certificate" were before the Court. The trial court being advised of the procedural error, cured it by order, and then finding that the petitioner was qualified, as admitted by the Government, and that all proofs were satisfactory, ordered the judgment of naturalization. It had acted in "furtherance of justice," had denied no request for additional time, had not affected the rights of any one connected with the proceedings.

C. *Requirement of Attachment Is Not Mandatory.*

The Circuit Court has cited as its authority the case of *French v. Edwards*, 13 Wall. (80 U. S.) 506, for the proposition that the statutory requirement as to the time of filing is mandatory. That very case (involving the method by which a sheriff sold property for taxes) indicates that "regulations designed to secure order, system and dispatch in proceedings, and by a disregard of which the rights of parties interested cannot be injuriously affected" are usually directory only. The Government on its brief below stressed the im-

portance of literal enforcement and mandatory interpretation of the statute on the grounds of "order, system and dispatch"—the very reasons given in the French case for holding it a directory provision.

Further, it is one thing to hold regulations for the guidance of an administrative official to protect the property of a citizen as mandatory, and another to consider every statutory procedural requirement as literally binding on the District Courts.

IV.

THE DECREE ADMITTING THE PETITIONER TO CITIZENSHIP RENDERED BY THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN ON FEBRUARY 11, 1924, IS RES JUDICATA AS TO THE ISSUE TENDERED BY THE GOVERNMENT IN THIS PROCEEDING TAKEN UNDER SECTION 15 OF THE NATURALIZATION ACT.

The defense of *res judicata* was pleaded by the petitioner. In the brief on behalf of the Government in opposition to the application for a writ of certiorari, it is admitted that this defense was properly raised in the pleadings and that the facts on which it is based appear in the petition for cancellation. There it is shown that when, in the naturalization proceeding, the petitioner's application came on for hearing before the United States District Court, objection was made to the granting of the petition by the Assistant Chief Naturalization Examiner on behalf of the Govern-

ment, on the precise ground which is now made the basis of the action brought under Section 15, and that the objection was overruled by the court and the petitioner was admitted to citizenship and received her certificate accordingly (R. 4, 5).

Section 11 of the Naturalization Act reads:

> "That the United States shall have the right to appear before any court or courts exercising jurisdiction in naturalization proceedings for the purpose of cross-examining the petitioner and the witnesses produced in support of his petition concerning any matter touching or in any way affecting his right to admission to citizenship, and shall have the right to call witnesses, produce evidence and be heard in opposition to the granting of any petition in naturalization proceedings."

No appeal was taken from the decree admitting the petitioner to citizenship, and more than a year elapsed thereafter before this proceeding was instituted. The original proceeding was clearly an adversary proceeding, and the question therein litigated was determined by the decree rendered.

In the present proceedings no new question of fact or of law is raised. The records in both proceedings are practically identical. It is not pretended that the petitioner was guilty of any fraud, or that she herself did anything which constituted "illegality." What is now alleged to be the infirmity in the original proceeding was brought to the attention of the court by the representative of the Government. The original petition was granted. There was no request on behalf of the Government for further time in order to carry on any investigation, and no further facts appear to have been discovered after the lapse of sixteen months.

Since the decision in *United States v. Ness*, *supra*, this Court in *Tutun v. United States* and *Neuberger v. United States*, (270 U. S. 568), has definitely considered the nature of naturalization proceedings, and has not only held that an order or decree granting a petition for naturalization is reviewable, but that in passing upon the application the court exercises judicial judgment and that, by Section 11 of the Naturalization Act, the full rights of a litigant are expressly reserved to the Government and its contentions are submitted to the court for adjudication.

Unless there is controlling reason, therefore, to exclude such an adjudication from the general principles applicable to the doctrine of *res judicata*, one would suppose that such an adjudication as was made in the original proceedings estops the Government from relitigating the only proposition as to which an issue was raised in the earlier proceeding.

In the Brief of the Government in opposition to the application for a writ of certiorari herein, it is said (p. 15):

> "Some uncertainty now exists as to the extent to which judgments in naturalization proceedings estop the United States to litigate in suits under Section 15 questions raised by it and decided against it in the naturalization proceedings."

The first case which came before this Court under Section 15 is *Johannessen v. United States*, 225 U. S. 227. There it was charged by the Government that the appellant procured from the court a certificate of citi-

zenship in less than four years after he arrived in the United States, and that the certificate was based upon the perjured testimony of two witnesses, to the effect that he had resided within the limits and under the jurisdiction of the United States for five years at least prior to that time. The facts were not discovered by the Government until five and a half years later, when the appellant admitted them. The Government did not appear in the naturalization proceedings, and the effect of such appearance, if any there had been, was not passed upon, Mr. Justice Pitney saying:

> (225 U. S. 237) "What may be the effect of a judgment allowing naturalization in a case where the Government has appeared and litigated the matter does not now concern us. (See 2 Black, Judgts., Sec. 534, a.) What we have to say relates to such a case as is presented by the present records, which is the ordinary case of an alien appearing before one of the courts designated by law for the purpose, and, without notice to the Government and without opportunity, to say nothing of duty, on the part of the Government to appear, submitting his application for naturalization with *ex parte* proofs in support thereof, and thus procuring a certificate of citizenship."

In the opinion the Court further emphasizes the distinction on which we rely:

> (225 U. S. 238) "The foundation of the doctrine of *res judicata*, or estoppel by judgment, is that both parties have had their day in court. 2 Black, Judgts., Sects. 500, 504. The general principle was clearly expressed by Mr. Justice Harlan, speaking for this Court in *Southern Pacific R. Co. vs. United States*, 168 U. S. 1, 48: 'That a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed

> in a subsequent suit between the same parties or their privies.' Sound reason, as we think, constrains us to deny to a certificate of naturalization, procured *ex parte* in the ordinary way, any conclusive effect as against the public."

In *United States v. Ginsberg*, 243 U. S. 472, it does not appear that, at the time of the granting of the order of naturalization, there was any appearance on behalf of the Government under Section 11. It does appear from the form of the question certified that, after the applicant's petition had been first presented in open court, the hearing thereon was passed to and finally held in the chambers of the judge adjoining the court room, on a subsequent day and at an earlier hour than that to which the court had been regularly adjourned. In other words, there was no proceeding in court. It also appeared that the certificate was illegally procured, in that, upon the uncontradicted evidence at the hearing upon the petition, it was shown indisputably that the petitioner was not qualified by residence for citizenship. There is, therefore, nothing in the decision which bears on the subject of *res judicata*.

In *United States v. Ness*, *supra*, the naturalization proceedings were instituted in a State court of Iowa. The applicant never filed an "arrival certificate" and suit was brought in the Federal court to cancel the certificate of citizenship on the allegation that it had been "illegally procured" for the reason stated. The first proposition passed upon was as to whether the filing of the "arrival certificate" is an essential prerequisite to a valid order of naturalization. It was held that it was. The question next considered was whether the

order entered in the proceeding in the State court, to which the United States became a party under Section 11, was *res judicata*. After noting that this question had been left undecided in *Johannessen v. United States, supra*, the Court said:

> (245 U. S. 325) "The remedy afforded by Section 15 for setting aside certificate of naturalization is broader than that afforded in equity, independently of statute, to set aside judgments, * * *; but it is narrower in scope than the protection afforded under Section 11. Opposition to the granting of a petition for naturalization may prevail, because of objections to the competency or weight of evidence or the credibility of witnesses, or mere irregularities in procedure. *A decision of such minor questions, at least of a State court of naturalization, is, though clearly erroneous, conclusive even as against the United States if it entered an appearance under Section 11.* For Congress did not see fit to provide for a direct review by writ of error or appeal. * * * It was the purpose of Congress, by providing for appearances under Section 11, to aid the court of naturalization in arriving at a correct decision and so to minimize the necessity for independent suits under Section 15. * * * But in our opinion Section 11 and Section 15 were designed to afford cumulative protection against fraudulent or illegal naturalization."

It may be here stated parenthetically that in the State courts judgments granting or denying petitions for naturalization have generally been held to be reviewable on appeal like other cases. This is shown by the cases collated in the note on page 575 of the decision in *Tutun v. United States*.

In *United States v. Pandit*, 15 F. (2d) 285 (certiorari denied, 273 U. S. 759), decided by the Circuit

Court of Appeals for the Ninth Circuit, the applicant had been admitted to citizenship on May 7, 1914. At the hearing the United States appeared by an examiner of the Bureau of Naturalization and contested the applicant's right to naturalization on the ground that he was not "a free white person" within the meaning of the Naturalization Act. Proceedings were then instituted under Section 15 for the cancellation of the certificate on the same grounds as were presented by the Government on the original hearing. It was held that the judgment granting the certificate, being a final judgment, was conclusive as to all *media concludendi* and not affected by the correctness of the findings supporting it, and could not be impeached by showing that it was based on a mistake of law; consequently, that the case was governed by the doctrine of *res judicata*. After quoting the passage from *Johannessen v. United States, supra*, Judge Neterer said:

> (P. 287) "The court in this decision recognized the doctrine of *res judicata*, except in *ex parte* cases, applicable to a naturalization hearing."

After citing *Tutun v. United States* and *Mutual Benefit Life Ins. Co. v. Tisdale*, 91 U. S. 238, 245, the opinion continues:

> "It is thus conclusively established by the Supreme Court that a judgment granting a certificate of naturalization is a final judgment. The correctness of the findings to support the judgment does not affect it. *Milne vs. Deen*, 121 U. S. 525. And it is conclusive as to all *media concludendi*, and cannot be impeached by showing that it was based on mistakes of law. *Fauntleroy vs. Lum*, 210 U. S. 230; *American Express Co. vs. Mullins*, 212 U. S. 311."

The opinion of Mr. Chief Justice Taft in *North Carolina R. Co. v. Story*, 268 U. S. 288, 292, was also quoted:

> "Coming now to the merits, it may be conceded that the first judgment against the company in favor of the administrator, however erroneous it was in view of the cases of *Missouri Pac. R. Co. vs. Ault*, 256 U. S. 554, and *North Carolina R. Co. vs. Lee*, 260 U. S. 16, not having been appealed, was *res judicata*."

Then follows the concluding paragraph in the *Pandit* case:

> (15 F. 2d 287) "By the same token erroneously granting naturalization to the defendant, the right to citizenship having been distinctly put in issue, the United States appearing and contesting, and the issue directly determined by a court of competent jurisdiction, the judgment, not having been modified or reversed, cannot now be disputed."

In *United States v. Richmond*, 17 F. 2nd, 28, decided by the Circuit Court of Appeals for the Third Circuit, it was held that the certificate of citizenship issued after appearance by the Government under Section 11, where it was shown that the Judge had left the court room during the proceedings, during which time proof was made before the clerk, could not be cancelled in an action under Section 15. See quotation from opinion of Judge Buffington, (quoted supra p. 27) part of which follows:

> (17 F. 2d 31) "The United States being present, and therefore a party, with a litigant's rights in this naturalization proceeding, had the right to object to any error or irregularity, and, if dissatisfied with the decree, to appeal therefrom. We note here there are no after discovered facts. All

> that was done when Richmond's petition was before the court, or omitted to be done, was then and there known to the United States, and no objection made hereto."

The same court followed this decision in *United States v. Svednik*, 19 F. 2nd, 71.

See also *United States v. Lenore*, 207 Fed. 865, 869, 871.

V.

THE EFFECT UPON ALL NATURALIZED CITIZENS OF THE PREVAILING OPINION BELOW IS OF THE MOST SERIOUS CONSEQUENCE.

The danger of the decision below to the naturalized citizens of this country must be apparent. Its effect is best characterized in the language of the first paragraph of Judge Alschuler's dissenting opinion:

> (R. 28) "The principle declared in this opinion is far reaching. Its general application would subject to such collateral attack every naturalization certificate granted since the act was adopted, however in good faith granted and received, where it is shown there was in the proceedings any departure from formal procedural statutory provisions, however trivial and inconsequential, and which by no possibility did or could affect the merits."

The serious consequences of the decision of the Circuit Court of Appeals in this case cannot be exaggerated. Such an action as is contemplated by Section 15 does not seem to be barred by any statute of limita-

tions. Consequently an action of this character may be brought long after the decree of naturalization has been granted, and after real property has been acquired by the person naturalized and his status has in many ways been affected. If for instance, after the expiration of twenty years, an action were brought under precisely the same circumstances as the present, the person so naturalized would be in a sad plight. He might be unable to prove the circumstances under which his petition was presented to the court. Memories will have become dimmed and witnesses may have died or disappeared. If a decree of cancellation should be rendered, the previous declaration of intention would have lapsed and it would be necessary to make a new declaration and to suffer further delay in attaining the right of citizenship previously conferred.

In the thousands of naturalization cases before the courts each year doubtless great numbers exist wherein procedural defects have occurred without the slightest fault on the part of the applicant for citizenship. Frequently they are due to the officers of the Government. The applicant acts on the assumption that the official who prepares the petition is familiar with the filling out of the forms and is accurate in the performance of the function entrusted to him. At all events, in a case where the Government is also represented on the hearing and either no objection is made or the objection that is made is overruled by the court, it would seem that, in order to constitute a case of illegal procurement which will constitute "good cause" for the bringing of an action under Section 15, a state of facts must be presented which indicates a vital defect as distinguished from an irregularity or a technical non-

compliance with the letter of the statute, its spirit having been observed at the time of the rendition of the decree of naturalization.

VI.

In view of the facts in the case and what has herein been set out it is respectfully submitted that the judgment of the Circuit Court of Appeals for the Seventh Circuit be reversed and that of the United States District Court for the Eastern District of Wisconsin be affirmed.

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In the

Supreme Court of the United States

October Term, 1938.

No. 37.

ANNA MARIE MAYER,

Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR REHEARING, TOGETHER WITH CERTIFICATE AND COPY OPINION OF THIS COURT.

LOUIS MARSHALL,
MAX J. KOHLER,
ARTHUR V. MOORE,
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The Knight Press, 20 Vesey St., N. Y. Tel. Barclay 7-8560

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IN THE

Supreme Court of the United States

ANNA MARIE MANEY, Petitioner, vs. UNITED STATES OF AMERICA.	No. 27. October Term, 1928.

PETITION FOR REHEARING.

To the Supreme Court of the United States:

Petitioner respectfully prays this Honorable Court for a rehearing of this cause, or for other appropriate relief, and shows:

FIRST.

This Court, on October 22, 1928, in an opinion by Mr. Justice Holmes (copy of which is hereto annexed as an Appendix), decided this cause, which had been argued this term, and affirmed the decision of the United States Circuit Court of Appeals for the Seventh Circuit (Judge Page writing, Judge Alschuler dissenting, reported in 21 F. [2nd] 28), and reversing the decision of the United States District Court for the Eastern District of Wisconsin (Judge Geiger writing, reported in 13 F. [2nd] 662). Certiorari had been ordered to issue by this Court January 9, 1928.

SECOND.

By inadvertence of counsel, important decisions, statutes, and rules, and incidents in the legislative history of the Naturalization Law of 1906 involved, were not called to the attention of the Court. The unexpectedly rapid progress made by this Court in its calendar compelled counsel hurriedly to prepare and file petitioner's brief in May last. Counsel had contemplated filing a reply brief, but the Government's brief was served only a few days before the oral argument herein, and time to prepare such a brief was wholly inadequate.

THIRD.

The opinion of this Court lays much stress on the clause in the beginning of Section 4 of the Naturalization Act of June 29, 1906, involved, which reads: "That an alien may be admitted to become a citizen of the United States in the following manner *and not otherwise*," as indicating that the filing of the Certificate of Arrival with the petition was regarded as mandatory and not directory. It was, however, overlooked that the legislative history of our Naturalization Laws, especially in the light of the facts collated in *U. S. v. Viaropulos*, 221 Fed. 485 at 488-489, shows conclusively that these words were first inserted in the Naturalization Act of 1795 for the sole purpose of superseding State Naturalization Laws, in the exercise of the constitutional authority conferred on Congress "to establish a uniform rule of naturalization." They do not relate to the details of procedure in the courts in respect to the exercise of their power to naturalize.

The words "*and not otherwise*" were embodied in the Act of 1795 at a time when various States of the Union were naturalizing aliens on entirely different terms from

those specified in the earlier Federal act, for the express and avowed purpose of superseding such inconsistent State enactments. This is pointed out by the editor of the "Federal Statutes Annotated Series" (Vol. VI, pp. 956-957), and those words have been carried along in every naturalization act since 1795. Under the familiar principle that words in a statutory revision are to be construed in the sense in which they were used in the original act (36 *Cyc.* 1067-1068; *United States* v. *Cerecido*, 209 U. S. 337; *Heald* v. *District of Columbia*, 254 U. S. 20, 22), they have no different significance in the Act of 1906 here involved, or in the intermediate naturalization laws, although so far as discerned, this point had not been called to this Court's attention prior to the present case. This accounts for some rather sweeping language in *United States* v. *Ness*, 245 U. S. 319, a case which was doubtless correctly decided on the facts involved in it.

We venture to quote at length from the able opinion of Judge Orr in the *Viaropulos* case, *supra:*

> *"The provisions, at the beginning of section 4, that an alien may be admitted to become a citizen of the United States 'in the following manner and not otherwise,'* has given rise to some differences of opinion. It has created a tendency on the part of the representatives of the Bureau of Naturalization to criticize every variation, oftentimes the very slightest, from the exact language of the act. *Practically the same language appeared in the second Naturalization Act, passed by Congress on the 29th of January, 1795.* See 1 Stat. at Large, 414. That act was entitled:
>
> 'An act to establish an uniform rule of naturalization, and to repeal the act heretofore passed on that subject.'
>
> The following quotation therefrom is sufficient:
>
> 'For carrying into complete effect, the power given by the Constitution, to establish an uniform rule of naturalization throughout the United States:

> Section 1. * * * any alien, being a free white person, may be admitted to become a citizen of the United States, or any of them, *on the following conditions, and not otherwise.*'

The prior act, which was that of March 26, 1790 (1 Stat. at Large 103), did not contain the words last above quoted. *In the meantime many of the states*, notwithstanding the constitutional provision that Congress should have power 'to establish an uniform rule of naturalization,' *had been exercising a supposed right of admitting aliens to citizenship in the respective states.* At April term, 1792, in the United States Circuit Court for the Pennsylvania District, in the case of *Collet* v. *Collet*, 2 Dall. 294, 1 L. Ed. 387, Fed. Cas. No. 3,001, the court say:

> 'The question now agitated depends upon another question: Whether the state of Pennsylvania since the 26th of March, 1790 (when the act of Congress was passed), has a right to naturalize an alien? And this must receive its answer from the solution of a third question; whether, according to the Constitution of the United States, the authority to naturalize is exclusive or concurrent? * * * We are of opinion, then, that the states, individually, still enjoy a concurrent authority upon this subject, but that their individual authority cannot be exercised so as to contravene the rule established by the authority of the Union.'

The Court further say:

> 'The true reason for investing Congress with the power of naturalization has been assigned at the bar. It was to guard against too narrow, instead of too liberal, a mode of conferring the rights of citizenship. Thus, the individual states cannot exclude those citizens who have been adopted by the United States, but they can adopt citizens upon easier terms than those which Congress may deem it expedient to impose.'

That decision, intervening as it did between the acts of 1790 and 1795, *seems to have required that the language in the act of 1795 should indicate an*

> *exclusive method of naturalizing foreigners.* Since Chirac v. Chirac, 2 Wheat. 260, 269 (4 L. Ed. 234), where Chief Justice Marshall uses this language, 'That the power of naturalization is exclusively in Congress does not seem to be, and certainly ought not to be, controverted,' the meaning of the constitutional provision never seems to have been seriously doubted. *That every variation from the exact language of the act should have the effect of rendering illegal the action of the court would be a strained construction, especially in view of section 27, which sets forth forms to be used in the proceedings to which they relate. That section does not say: The following forms shall be used* in the proceedings to which they relate, *but it says 'substantially'* the *following forms shall be used* in the proceedings to which they relate."

Without enumerating all the States which had inconsistent acts of their own in force in 1795, under which naturalization proceedings were conducted, it will suffice to point out that Pennsylvania courts were continually naturalizing foreigners after only one year's residence pursuant to her own act of March 17, 1789, Section 3 (13 Pennsylvania Stats. at Large, 1787-1790, p. 222), while New York, for instance, naturalized aliens unconditionally by special legislative act (see Laws of State of New York, 1789-1796, Vol. III, p. 83). *The legislative intention by the use of the words "and not otherwise" to strike down these State laws, despite vigorous State rights opposition, was unmistakably shown by the Congressional debates of 1794-1795, reported in "Annals of Congress"* (Vol. III, 1793-1795, pp. 811-816, 1004, 1021, 1042-1050, 1060-1065), which are ably summarized in *Prof. F. G. Franklin's "Legislative History of Naturalization in the United States"* (pp. 66-68), as follows:

> "The bill passed rapidly through the Senate. There was debate on a motion to insert in the first section 'That no alien shall hereafter become a citizen of the United States, or any one of them, *except in the manner prescribed by this act.*' (This motion was withdrawn for amendment the following day, after the failure of an effort to commit the bill and

the amendment.) It was agreed however to insert the words 'any of' after 'citizen of' in the clause that as amended reads: 'That any alien being a free white person, may be admitted to become a citizen of any of the United States on the following conditions' *and then by a vote of 13 to 11, 'and not otherwise' was added.* • • • The power vested in congress to establish a uniform rule of naturalization was the power of making state citizens from aliens. *By the final phrase, the assertion is made that this power is an exclusive one.*"

FOURTH.

By inadvertence of petitioner's counsel, the Court overlooked an opinion rendered by Mr. Chief Justice Marshall in 1830 in *Spratt* v. *Spratt*, 4 Peters 393, construing an almost identical "Certificate of Arrival" provision in an earlier Naturalization Act as directory only, and not mandatory, and providing for a liberal construction of Naturalization Acts.

In the case in question the validity of the naturalization of one Spratt was involved. He arrived in this country in 1812, but did not have himself enrolled as a resident alien under the Act of 1802 until April 17, 1817; he was naturalized on October 11, 1821, but his certificate of naturalization did not comply with Section 6 of the Act of 1816, which had been enacted before his naturalization, but was held inapplicable to him because he had arrived before June 18, 1802. *It is significant that the opinion specifically quoted* (p. 405) *from the Act of 1802 the words "on the following conditions and not otherwise," but gave them no such weight.* Two questions here relevant were considered: (1) *the requirement of a liberal construction of a Naturalization Law, in favor of the prospective citizen,* and (2) *the directory character of a provision for filing a certificate of landing, despite the words "and not otherwise."* Said the Chief Justice:

> "1. The first question depends on the Act of 1802 for establishing an uniform rule of naturali-

zation. The act declares that an alien may be admitted to become a citizen of these United States *'on the following conditions, and not otherwise.'* The act then prescribed four conditions, the three first of which were applicable to James Spratt, and were literally observed.

The 2d section enacts 'that in addition to the directions aforesaid, *all free white persons being aliens, who may arrive in the United States after the passing of this act*, shall, in order to become citizens of the United States, *make registry and obtain certificates in the following manner*, to wit: every person desirous of being naturalized, shall, if of the age of twenty-one years, *make report of himself*, &c.' The law then directs what the contents of the report shall be; orders it to be recorded, and that a certificate thereof shall be granted to the person making the report: *'which certificate shall be exhibited to the court by every alien who may arrive in the United States after the passing of this act, on his application to be naturalized, as evidence of the time of his arrival within the United States.*

As James Spratt arrived within the United States after the passage of the Act of 1802, he is embraced by the second section of that act, and was under the necessity of reporting himself to the clerk, as that section requires. *Must this report be made five years before he can be admitted as a citizen?*

The law does not in terms require it. The third condition of the first section provides 'that the court admitting such aliens shall be satisfied that he has resided within the United States five years at least,' *but does not prescribe the testimony which shall be satisfactory.* This section was in force when James Spratt was admitted to become a citizen, and was applicable to his case. But the second section requires, in addition, that he shall report himself in the manner prescribed by that section; and *requires that such report shall be exhibited, 'on his application to be naturalized, as evidence of the time of his arrival within the United States.' The law does not say that this report shall be the sole evidence*, nor does it require that the alien shall report himself within any limited time after his arrival. Five years may intervene between his arrival and report, and yet the report will be valid.

The report is undoubtedly conclusive evidence of the arrival, and must be so received by the court; but if the law intended to make it the only admissible evidence, and to exclude the proof which had been held sufficient, that intention ought to have been expressed." Yet the inference is very strong from the language of the act, that the time of the arrival must be proved by this report; and that a court, about to admit an alien to the rights of citizenship, ought to require its production.

But is it anything more than evidence which ought, indeed, to be required to satisfy the judgment of the court, but the want of which cannot annul that judgment? The judgment has been rendered in a form which is unexceptionable. Can we look behind it, and inquire on what testimony it was pronounced?

The act does not require that the report shall be mentioned in the judgment of the court, or shall form a part of the certificate of citizenship. The judgment and certificate are valid, though they do not allude to it. This furnishes reason for the opinion that *the act directed this report as evidence for the court; but did not mean that the act of admitting the alien to become a citizen should be subject to revision at all times afterwards, and to be declared a nullity, if the report of arrival should not have been made for years previous to such admission.*"

Taking up next the question relating to the Act of 1816 and its general conclusion, the Court said:

"The act of 1816, sec. 6, has, we think, considerable influence on this question. That act requires that the *certificates of report and registry required* as evidence of the time of arrival in the United States and of the declaration of intention to become a citizen, 'shall be exhibited by every alien, on his application to be admitted a citizen of the United States, who shall have arrived within the limits and under the jurisdiction of the United States since the 18th day of June, 1812; *and shall each be recited at full length in the record of the court admitting such an alien; and any pretended admission of an alien*, who shall have arrived within the limits and

under the jurisdiction of the United States since the said 18th day of June, 1812, to be a citizen, and after the promulgation of this act, *without such recital of such certificate at full length, shall be of no validity.*'

James Spratt arrived within the United States previous to the 18th day of June, 1812, and is, consequently, not within the provisions of the Act of 1816.

This act is not intended to explain the Act of 1802, but to add to its provisions. It prescribes that which the previous law did not require; and prescribes it for those aliens only who arrive within the United States after the 18th day of June, 1812. It annuls the certificates of citizenship which may be granted to such aliens, without the requisite recitals; consequently, without this act, such certificates would have been valid. The law did not require the insertion of these recitals in the certificate of James Spratt.

The various acts upon the subject submit the decision on the right of aliens to admission as citizens to courts of record. They are to receive testimony, to compare it with the law, and to judge on both law and fact. This judgment is entered on record as the judgment of the court. *It seems to us, if it be in legal form, to close all inquiry; and, like every other judgment, to be complete evidence of its own validity.*

The inconvenience which might arise from this principle, has been pressed upon the court. *But the inconvenience might be still greater if the opposite opinion be established. It might be productive of great mischief, if after the acquisition of property on the faith of his certificate, an individual might be exposed to the disabilities of an alien, on account of an error in the court not apparent on the record of his admission.* We are all of opinion that James Spratt became a citizen of the United States on the 11th of October, 1821."

FIFTH.

United States v. _Ness_ (245 U. S. 319), though correctly decided, does not require affirmance of the decision below herein, but some of the references to the Certificate of Arrival contained in the opinion, believed to be based upon a failure to note the purpose of the words "and not otherwise," have given rise to conflicting views in the court below, which, moreover, overlooked the fact that petitioner's predicament is due to mistakes occasioned by the acts or omissions of Government officials.

In *United States* v. *Ness*, the alien not only did not produce the certificate of arrival during the pendency of the proceedings, but concededly could not do so, nor could he supply secondary evidence of its contents to establish that he had been legally admitted, for, concedesly his entry without the statutory inspection by the immigration authorities requisite (p. 321), was absolutely illegal. Instead of being naturalizable, he was deportable under the Immigration Laws for an illegal entry (Act of 1917, Secs. 12, 15-16, 18-19); Congress certainly did not intend to make such illegal entry, the beginning of the requisite five years' "residence" under the Naturalization Laws, as was pointed out by Judge Neterer in *In re Kempson*, 14 Fed. (2nd) 668 at 669.

Section 4, Second, subdivision 4 of the Act of 1906 (which has become Sec. 380 of Title 8 of the United States Code), reads:

> "*At the time of filing his petition there shall be filed with the clerk of the court a certificate from the Department of Labor*, if the petitioner arrives in the United States after the passage of this act, *stating the date, place and manner of his arrival in the United states, and the declaration of intention of such petitioner, which certificate and declaration shall be attached to and made a part of said petition.*"

It will be observed that *this is impersonal*, with respect to the designation of the person who is to file the two documents referred to, and who is to attach them. *It cannot refer to the petitioner himself, as concerns the declaration of intention referred to, at least, because that must have been on file previously for not less than two nor more than seven years* after its execution (Sec. 4, Second), and must before that time have been bound in the clerk's docket (Sec. 14). Under the Secretary of Labor's Regulations Rule 4, subdivision B* (referred to in the opinion of this Court, and authorized to be promulgated in Sec. 28 of the Act), this declaration must be executed in triplicate, the original remaining on file. This is the copy required to be filed with the petition years later. *Neglect to attach these documents is therefore the fault of the clerk, not of petitioner.* Rule 5, subdivision B, paragraph 1, provides that *the Clerk shall not accept or file* the petition for naturalization, *unless the "Certificate of Arrival" is attached, again showing that it was the clerk's fault, and not the petitioner's, that the petition here involved was filed without the arrival certificate. What may have happened in the instant case, as in In re Pick*, 209 Fed. 999, *is that the certificate was produced by petitioner when the petition was tendered to the clerk, but was lost by him before it was attached (for all presumptions are that otherwise the clerk would not have received the petition), and that petitioner's statement in her petition on the official form* set forth in Section 27 was true, that "*attached hereto and made a part of this petition are my declaration of intention to become a citizen and the certificate from the Department of Labor required by law*" so far as she could control the subject.

* References are made herein to the edition of the Regulations promulgated in June, 1924, although the naturalization decree herein was made in February of that year. In that respect we follow the Government's brief, which quotes one passage from the earlier edition of 1920, and many from the next edition, issued in 1924. This course is not unjustified, because nearly all the provisions in the 1924 edition were promulgated as separate amendments to the 1920 edition, from time to time, before the hearing of petitioner's application for naturalization herein.

That accounts for the fact set forth in the District Court's opinion (Record, p. 7), that "twenty days thereafter * * * (after filing of the petition) such certificate was mailed to the Clerk by the District Director of Naturalization—acting I assume for the Department of Labor, and it would seem, on behalf of, or at least in the interest of, the petitioner." Far from treating such belated filing as jurisdictional, it doubtless took place under Rule 5, subdivision B, paragraph 3—not heretofore called to this Court's attention—reading:

> "*District directors of naturalization* and [sic] assistant naturalization examiners may, at the expense of the alien candidate for citizenship *telegraph to the proper authorities* for information, concerning the time, place and manner of such alien's arrival in the United States, *and may upon advices in response to such telegram, issue or direct the issuance of a certificate of arrival to such alien in accordance therewith.*"

Instead of following this authorization directly, the District Director erroneously waited till it reached him from Washington by mail, meantime arranging for the filing of the petition forthwith. Nevertheless his successor took this technical objection on the hearing.

As said by Judge Neterer in *In re Kempson*, 14 Fed (2nd) 668, *supra*, in a naturalization case:

> "*Applicants, however, are not responsible for defaults of officials in making proper registration, when they reported for inspection.* * * * *He should not now be made to suffer for this official irregularity.* * * * Pincus, having reported for inspection, was examined and passed but no record at the time was made. *A nunc pro tunc certificate is proper in his case because it supplies a record which should have been made at the time.*"

See accordingly:

> *Matter of Christen*, 43 N. Y. Super. 523, 527-529 (1878).

It will furthermore be observed that the Certificate of Arrival is based on the record required to be made "in books of record" by Section 1 of this same Act, concerning

> "each alien arriving in the United States from and after the passage of this act" (stating) "the date of arrival of said alien, and if entered through a port, the name of the vessel in which he comes. * * * And it shall be the duty of said commissioner of immigration to cause to be granted to such alien, a certificate of such registry, with the particulars thereof."

This merely requires the transcribing into such dockets of the information contained in the ship's manifests kept in accordance with the practice in vogue for many decades as to each arriving immigrant under the Immigration Laws, and embodied in the Immigration Act of 1917 as Sections 12 and 13 (see *McInerny* v. *United States*, 143 Fed. 729 at 736-738). *The fact is important for consideration to meet the mistaken suggestion of this Court that there is nothing of public record, by which to amend the omission of a certificate of arrival from the naturalization petition*, nor is it denied that the belated certificate in the instant case was procured from such public immigration records by the Immigration Bureau.

The Naturalization Law requires the petition to set forth all the facts contained in the "Certificate of Arrival" (Sec. 4, subd. Second, and form petition in Sec. 27), and all the facts to be set forth in the "Certificate of Arrival" were set forth in the petition herein, for use in governmental or other "checking up," the "Certificate of Arrival" being *employed as governmental contemporary confirmation of such arrival and authorized admission*. The Act of 1906, however, required the preparation of such docket abstracts of entry (Sec. 1) and the production of "Certificate of Arrival" only of persons who arrived *after* its passage, because it appeared in the debate on the bill that many of the basic ship's manifests had been lost or accidently destroyed by fire (*Congressional Record*, Vol. 40, Pt. 8, p. 7764). As will be presently shown, some

have since been destroyed also, before they were carried over into the dockets provided for in Section 1, *so that this case indirectly involves the very important question, affecting thousands of applicants for citizenship, whether naturalization must be perpetually denied to them on the assumption that secondary evidence of arrival may not be adduced to satisfy the Immigration Bureau of legal entry, as in the case of all other destroyed records*, or whether the decision in *United States* v. *Ness* is to be construed *as literally making production of such certificates taken from the ship's manifest, jurisdictional* (see *Hogan* v. *Kurtz*, 94 U. S. 773; *United States* v. *Price*, 113 Fed. 851; *Strickly* v. *Hill*, 22 Utah, 257, 268-270; *People* v. *McNally*, 59 How. Pr. [N. Y.] 500; *Gagnon* v. *United States*, 38 Ct. Cls. 10, aff'd 193 U. S. 451; *Am. Land Co.* v. *Zeiss*, 219 U. S. 47; *Am. & Eng. Anno. Cases*, 1916D, 248-258; *United States* v. *Jung Ah Lung*, 124 U. S. 621, at 633-635; *In re Page*, 206 Fed. 1004; *In re McPhee*, 209 Fed. 143; *In re Peck*, 209 Fed. 999). For a considerable time the Immigration Bureau issued *nunc pro tunc certificates under such circumstances*, but suddenly stopped on the supposed holding in *United States* v. *Ness*. The Government's own files establish a basis for secondary evidence in such cases, by showing the loss or destruction of the manifests of ships whose arrival is attested by its own contemporary customs and quarantine records. The Commissioner of Naturalization himself, in his annual report of July 1, 1925 (p. 16), wrote:

> "The Supreme Court of the United States has held, in the case of those coming to this country after June 29, 1906, that it is a mandatory requirement that the certificate of arrival be filed as a part of the petition. *There are large numbers of cases where, for some reason for which the alien is not responsible, there is no record of the date, place and manner of his arrival before June 3, 1921* (the date of the beginning of the quota restrictions). *In these cases it would seem to be unjust to deny the alien who had not evaded the law and who is not responsible for the lack of record, a certificate of arrival, and thereby prevent him from having his eligibility for naturalization determined.*"

Though everyone listed on a ship's manifest after the Law of 1906 was enacted is, of course, entitled to be registered and to secure a Certificate of Arrival under Section 1 of that Act, that section says nothing about ship's manifests, and is not thus limited; but latterly the immigration authorities have unlawfully declined to register (and to grant Certificates of Arrival) to persons who entered lawfully, but are not listed on extant manifests, because the latter have been lost or destroyed, thus preventing their naturalization.

In the light of these facts, it will be observed that *United States* v. *Ness* involved one who could not produce a "Certificate of Arrival" (or secondary official evidence of legal arrival) because he had entered unlawfully, and his legal "residence" in the United States had not yet begun (see *In re Kempson*, 14 Fed. [2nd] 668, *supra*, and *Kaplan* v. *Tod*, 267 U. S. 228, the latter holding that a minor imbecile child of a citizen has not begun to "dwell in the United States," when she was temporarily committed to the custody of a charitable society, pending deportation). Nay, more, conceding that Congress intended to require proof of lawful entry by official government records, as a condition for naturalization (subject to the usual rule allowing secondary evidence of destroyed records), there is no evidence of *lawful* entry whatever in the allegations of the petition, and none to justify a decree admitting petition to naturalization, *unless*, before decree, official proof of legal entry is furnished, and this fact was doubtless also in the mind of this Court in emphasizing, as it did in the opinion in *United States* v. *Ness*, the necessity of producing an official certificate of entry. *That is, however, an entirely different proposition from that here involved,—and in no way under consideration in the Ness case,—of the power of the Court to make good, before decree rendered, an omission, obviously of the Government officers themselves. Every item calling for checking up is set forth in the petition itself, and mere delay in filing the certificate can work no possible harm.*

This Court, speaking by Mr. Justice Brandeis, properly answered the question now under consideration in *United*

States v. *Ness* in the affirmative, "whether filing the certificate of arrival as provided in Sec. 4, subdivision second, is an essential prerequisite to a valid order of naturalization, and that it is not merely a form of proof which the naturalization court has power to dispense with for cause" (p. 322).

The Government's own records and the naturalization petition in the present case embrace all the facts (and additional details besides) contained in the Certificate of Arrival, which this Court (p. 323) describes as "the natural starting point for (this) investigation" (p. 323). The Court apparently overlooked the fact that the allegations required to be made in the petition enable the Government at once to compare them with the ship's manifests, without any need *meantime* for an immigration bureau "Certificate to state the date, place and manner of arrival" (Sec. 4). In *United States* v. *Ness*, no such verification was possible, because the alien, having by his own wrongful act entered illegally, could not show that he had ever entered lawfully. On page 324, the Court quoted the phrase of Section 4, to wit, "*in the following manner and not otherwise*," overlooking the fact that this language was merely intended to supersede State naturalization laws, and the construction thereof in *United States* v. *Vasquez*, 221 Fed. 485, *supra*, and of this Court in *Spratt* v. *Spratt*, 4 Peters 393, by Chief Justice Marshall to the contrary.

Undoubtedly the conclusion expressed at page 324 is correct, that "the value of contemporary documentary evidence was recognized, and the certificate of arrival was therefore specifically included among the prerequisites to naturalization." The intention of Congress governs, and not merely the letter of the law (*Church of the Holy Trinity* v. *United States*, 143 U. S. 457). "The letter killeth, but the spirit giveth life."

In the present case in the Court below (Record, p. 25), Judge Page, after quoting from the opinion of this Court in *United States* v. *Ginsberg*, 243 U. S. 472, *and specially*

emphasizing the words from the statute "and not otherwise," said:

> "This language seems to say that the *form and contents of the alien's sworn petition to the court and the manner of its preparation, filing and presentation shall be in exact accordance* with the provisions of the act, *and not otherwise*, before there is any *power* in the court to act upon it."

So also, in quoting and applying the language of the leading case of *French v. Edwards*, 13 Wall. 506, 511, distinguishing between "directory" and "mandatory" provisions, the lower Court (Record, pp. 24-25) said, with particular reference to the words *"and not otherwise"*:

> "And it seems to follow necessarily from what is said by the court, that *even provisions which are usually considered directory become mandatory if 'accompanied by negative words importing that the acts required shall not be done in any other manner or time than that designated.'"*

It is obvious that this decision rests almost wholly on the misapprehension referred to as to the meaning of the words "and not otherwise."

The decision in *United States v. Ginsberg*, *supra*, is sound beyond question, for Congress had expressly required that naturalization must be had in open court, as distinguished from chambers. *This provision related directly to the Court's jurisdiction*, and was intended to make the procedure public, solemn and judicial. There, also, however, the real meaning of the words "and not otherwise" were not called to the Court's attention, and although it referred to that phrase, it acted on the *controlling Section 9*, requiring proceedings to be "in open court." The case is well distinguished, however, in a unanimous opinion by the United States Circuit Court of Appeals for the Third Circuit in *United States v. Richmond*, 17 Fed. (2nd) 28, where the Judge who granted naturalization left the court room during part of the naturalization proceedings, which were conducted in open court, and held another session in another part of the

court house while the petitioner and his witnesses were examined before the clerk; the naturalization decree was held to be nevertheless valid as against collateral attack.

The mere omission to file the "certificate of arrival" with the petition, where it was supplied before the decree was granted, has been held not to vitiate the decree in the following cases:

In re Pick, 209 Fed. 999;
In re Titone, 233 Fed. 175;

and similar procedural errors have been similarly treated in

United States v. *Richmond*, *supra* (3rd Cir.);
United States v. *Skvednick*, 19 Fed. (2nd) 71 (C. C. A., 3rd Cir.);
United States v. *Milder*, 284 Fed. 571, at 572 (C. C. A., 8th Cir.);
United States v. *Pandit*, 15 Fed. (2nd) 285 (C. C. A., 9th Cir.); certiorari refused, 273 U. S. 759;
United States v. *Salomon*, 231 Fed. 928 (C. C. A., 5th Cir.); aff'd 231 Fed. 461;
United States v. *Lenore*, 207 Fed. 865;
United States v. *Erickson*, 188 Fed. 747;
United States v. *Ness*, 230 Fed. 950 (C. C. A., 8th Cir.); aff'd 217 Fed. 169; reversed 245 U. S. 319;
United States v. *Stoller*, 180 Fed. 910, 912.

SIXTH.

The provision for filing the Certificate of Arrival with the petition is directory only, not mandatory, as appears from consideration of other provisions of this Act, from related legislation, and from the legislative history of this Act of 1906, and such legislative intention should be given effect.

(a) *It will be observed that this same Act of 1906, while prescribing forms for use, says in Section 27 that "substantially the following forms shall be used,"* which is properly emphasized by Judge Orr in *United States* v. *Viscopalos*, 221 Fed., at page 489, *supra*, as showing that a holding that

> "every variation from the exact language of the act should have the effect of rendering illegal the act of the court, would be a strained construction."

Cf. Spratt v. *Spratt*, *supra*.

(b) *Moreover, the Naturalization Act provides for judicial proceedings (Spratt* v. *Spratt*, 4 Peters 393; *Tutun* v. *United States*, 270 U. S. 568), *and the Act should be read in conjunction with other statutes establishing procedure, including Section 954 of the United States Revised Statutes* (now Title 28, Sec. 777—see annotations, U. S. Code Anno., pp. 6692) *and Equity Rule 19* (see U. S. Code Anno., Title 28, Sec. 723, Notes Nos. 601-640), *authorizing liberal amendment of judicial pleadings and procedure in furtherance of justice* (*Norton* v. *Larney*, 266 U. S. 511, 515-517; *In re Wight*, 134 U. S. 135, at 146; *Am. & Eng. Anno. Cases*, 1915D, 526-649; *Underwood Cont. Corp.* v. *Davies*, 287 Fed. 776 [C. C. A.]).

Naturalization has been likened by this Court (*Tutun* v. *United States*, 270 U. S., at 578) to a grant of public land, and to a patent for an invention, and in those cases the right to amend is in no way curtailed (32 *Cyc.* 1007-1008, 1039; 30 *Cyc.* 891-892), nor in suits against the

United States which are purely statutory (*Great Falls Co. v. United States*, 16 Ct. Cls. 160, at 188-189 [aff'd 112 U. S. 645]). See, accordingly, *Spratt v. Spratt*, 4 Peters 393, *supra*.

In fact, naturalization proceedings have always been amended with great liberality throughout history, until the naturalization examiners appointed under the Act of 1906 began erroneously to engage in an effort to treat every deviation from the letter as jurisdictional, as pointed out by Judge Orr, supra, in the Viaropulos case, supra.

Matter of Wolton, 125 N. Y. Misc. Rep. 564
2 *Corpus Juris*, 1124 (Aliens, Amendment of Naturalization Record), citing
United States v. Stoller, 180 Fed. 910
State v. Macdonald, 24 Minn. 48, 58
Matter of Christern, 43 N. Y. Supp. 523, 527-529
Priest v. Cummings, 16 Wend. 617, at 625, Nelson, J. (reversed on other point, 20 Wend. 338).

See also:

United States v. Ericson, 188 Fed. 747, 748
In re Denny, 240 Fed. 845, Hand, J.
In re Pollock, 257 Fed. 350, 352, Mayer, J.
Matter of Hennig, 248 Fed. 990
McCarthy v. Marsh, 5 N. Y. 263, 284
Green v. Salas, 31 Fed. 106, 111, Speer, J.
Matter of Kevosian, 127 N. Y. Misc. Rep. 167
Matter of Kacusick, 208 N. Y. App. Div. 844
Matter of Vigo, 32 N. Y. Misc. Rep. 392

So long as there is anything existent by which to amend, even after the expiration of the term, amendment takes place freely.

Gagnon v. United States, 193 U. S. 451, aff'g 38 Ct. Cls. 10.

As is correctly said in *Corpus Juris, supra:*

> *"The record of naturalization may be amended as in other cases nunc pro tunc to make the record conform to the truth."*

The best and fullest discussion of the right to amend in naturalization proceedings seems to be contained in *Matter of Wolton*, 125 N. Y. Misc. Rep. 564, *supra*, where many of the prior authorities are reviewed, and it is well pointed out there that this Court recognized the right in *Gagnon v. United States*, 193 U. S. 451, at 456, though it properly held that the naturalization court there involved had no power *nunc pro tunc* to enter a decree of naturalization thirty three years after an alleged original order for a decree, merely on applicant's affidavit that such order had been made, without any contemporary paper, memorandum, or entry of any kind or authenticated or certified copy thereof being produced, tending to establish the fact by which to amend. As is pointed out in *Matter of Wolton, supra*, this Court recognized in the *Gagnon* case that the general rule was applicable to naturalization proceedings, that

> "The power to amend its records, to correct mistakes of the clerk or other officer of the court, inadvertencies of counsel or to supply defects or omissions in the record, even after the lapse of the term, is inherent in courts of justice."

(The opinion below in that case [38 Ct. Cls. 10] ably collates the authorities for the proposition.) Compare also the language of Learned Hand, J., in *In re Denny, supra*, of the Court in *United States v. Stoller, supra*, and the dissenting opinion of Alschuler, J., in the instant case. Until after 1906, at least, practically the universal rule regarding naturalization proceedings is that laid down (following *Spratt v. Spratt, supra*) in *McCarthy v. Marsh*, 5 N. Y. 263, at 284, where the Court said:

> *"All courts look with favor on proceedings to admit aliens to citizenship, and it is just that they should;* for the want of acquaintance with our laws and judicial proceedings, the unsettledness of their

> residences in general for some years, and the consequent liability to lose their documents and papers, should shield them from technical and sharp objections to their naturalization papers whenever there appears to have been an honest intention to become a citizen, and comply with the laws of our country."

The language of this Court as to the law favoring claims to citizenship is similar, for, quoting with approval from a Congressional Report in the leading case of *Boyd* v. *Thayer*, 143 U. S. 135, at 169, it said:

> "No principle has been more repeatedly announced by the judicial tribunals of the country, and more constantly acted upon, than that the leaning in questions of citizenship, should always be in favor of the claimant of it" (see also pp. 180-181).

In an able opinion in a naturalization case reported as *Scott* v. *Strobach*, 49 Ala. 477, at 488, following *Spratt* v. *Spratt*, *supra*, the Court said:

> "*If the intendments and presumptions made by the law in favor of the regularity of judicial proceedings can be more liberally applied to one class of cases than to another, they should be to a judgment defining the status of an individual*, conferring rights and privileges and becoming an essential element of the title and succession of estates. *It would serve no good purpose, and would not comport with the spirit of the naturalization laws, to subject a certificate of naturalization to a technical or critical examination, when presented as evidence of citizenship.* If it is granted by a court having jurisdiction and by fair construction *imports a substantial compliance* with the requirements of the law, it must be deemed conclusive. *The errors of the court, or its clerk, must not be visited on the man who reposes on it as his title to citizenship.*"

Similarly, this Court, in *Tutun* v. *United States*, 270 U. S. 568, at 578, said:

> "The opportunity to become a citizen of the United States is said to be merely a privilege and

> not a right. * * * The opportunity having been conferred by the Naturalization Act, there is a statutory right in the alien to submit his petition and evidence to a court, to have that tribunal pass upon them, and if the requisite facts are established, to receive the certificate. * * * *In passing upon the application, the court exercises judicial judgment. It does not confer or withhold a favor.*"

(c) *This Court, in the instant case, in fact recognized the right to amend, but overlooked the fact that the matters contained in the certificate of arrival were already matters of public record.*

In the opinion rendered herein, the right to cure defective allegations is recognized in the passage reading:

> "*Very likely it (the District Court) had power to cure defective allegations*, but it had not *power to supply facts*."

The latter statement seems to overlook the fact that *all the statements required to be contained in the certificate of arrival are set forth in the petition, and were for many months previously of public record in the ship's manifests and in the dockets required to be kept* by Section 4 of this very Naturalization Act of 1906, as above pointed out.

(d) *The provision which required the filing of the certificate of arrival with the petition for naturalization is declaratory only, as shown by the legislative history of the act and the attendant circumstances, provided the certificate is produced before the decree of naturalization issues.*

Naturalization proceedings are *sui generis*, in that they are conducted almost invariably by the lay petitioners themselves, without the assistance of counsel. This is not merely due to the fact that applicants are commonly persons in very modest circumstances, frequently lacking the means to engage counsel, but in large measure because the statute and public policy encourage direct applications without the intervention of counsel, so as to enable the

Government officers the better to pass on applicants, and to judge of their qualifications. Consequently, the Naturalization Law is replete with detailed *declaratory* provisions, and contains forms rarely found in any other statute, to aid applicants. Surely Congress cannot have intended to make all these clauses mandatory, and to so hold will lead to retention of counsel in such cases commonly, and reverse the present policy. Moreover, there is much more likelihood in naturalization proceedings than in any other class of cases for the occurrence of inadvertent errors, because of mistakes made by busy clerks and examiners, unfamiliar with the actual facts of the particular case, who in a large percentage of cases fill the blanks in the forms supplied. *In other quasi-administrative proceedings, conducted without the aid of counsel, this Court has declined to apply rigid rules of law* (United States *ex rel. Bilokumsky* v. *Tod*, 263 U. S. 149, at 157).

In the debates in Congress in 1906 upon this very bill, this thought is exemplified. Thus, Congressman Hayes (a member of the subcommittee which drafted the bill in the House [59th Congress, 1st Session, House Repr. Document No. 1789], who was in part charge of it there, and whose statements on another point are cited by this Court in the *Voss* case, at p. 325, footnote, as authoritative on the legislative intent, under the rule applicable in *Duplex Co.* v. *Deering*, 254 U. S. 443, 475), answering Congressman Smith's objection that the bill contained highly technical and complicated provisions, declared that there was no necessity for applicants to employ counsel, and intimated that it would not be construed with technical rigidity (*Congressional Record*, Vol. 40, Part 7, p. 7044). He said:

> "My colleague objects to the technical character of the papers required by the bill. I believe he will admit that this objection falls to the ground when he understands that the Government is to furnish all the blanks for these proceedings, and all that remains is for the applicant or the clerk of the court, or any person, to fill in the names, dates, etc. *No legal knowledge is necessary to perform this small*

> *act.* I fail to see where any hardship is imposed on the alien desiring naturalization other than those imposed upon him by the present law, except in the matter of fees * * *."

Everything strengthens the view that the legislative intent was, therefore, that the proceedings were to be treated with the informality of administrative proceedings, rather than with insistence on the rigid technical accuracy of legal proceedings. Thus, in *United States* v. *Stoller*, 180 Fed. 910, at 912, holding that the statutory provision (Sec. 4, subd. 2) requiring a naturalization petition to be filed in duplicate is *directory* only, and not mandatory, the Court said:

> *"The second subdivision of this section does require that it be made and filed in duplicate;* but since the power was conferred upon the court, and a petition duly verified was filed, the *omission to file it in duplicate was nothing more than an irregularity.* It did not affect the jurisdiction. The court could and should, of course, have required a literal compliance with the statute, *but the view that its action upon the petition was void* for the reason that its power was not thus invoked, *does not comport with the analogies of the law in the construction of statutes.* For instance, a statute required the consent of the father to a marriage. It was held that a marriage without it was not void. So a statute which required that contracts 'shall be signed by the commissioner' did not render void a contract not thus signed. Again, when a court martial was to be appointed in June and was not appointed until July, *the statute was held to be directory.* These illustrations are taken from Sedgwick on Construction of Statutory and Constitutional Law (2nd Ed.), p. 318 et seq., where numerous other cases to the same effect are cited by the learned author. *My conclusion is that the provision requiring the petition to be filed in duplicate is directory;* that it might be corrected on appeal if this court could sit as one of revision, *but the failure to so file does not render nugatory the act of a court admitting an applicant without it."*

See also:

Spratt v. *Spratt*, 4 Peters 393, *supra*.
United States v. *Solomon*, 231 Fed. 461, at 463; aff'd 231 Fed. 928.

The leading case of *French* v. *Edwards*, 13 Wall. 506, 511, distinguishes between declaratory and mandatory provisions, and it was cited in the majority opinion below (Record, pp. 24-25) only because the Court failed to take note of the history and true significance of the clause "*and not otherwise*," and therefore placed the provision here involved in the mandatory category, on the theory that the provision was "accompanied by negative words importing that the acts required shall not be done in any other manner or time than that designated."

Moreover, the statute itself (Sec. 12) gives the clerk of the Court thirty days' time to forward the petition to the Bureau of Naturalization at Washington after filing, so that the Legislature clearly did not intend to make a belated filing of twenty days jurisdictional.

So also the Naturalization Rules, in their "Foreword," require the "Bureau of Naturalization," and its duly authorized representatives, (to) "assist the alien candidate for citizenship in the proper execution of his declaration and petition," a duty inadequately performed by the officials charged with that duty in the instant case.

In the light of his enormous experience in the most populous Federal district in the country, the words of Judge Learned Hand in *In re Denny*, 240 Fed. 845, when he permitted an amendment even of a declaration of intention, by correcting the name of the sovereign, allegiance to whom was renounced, are very much in point:

> "Unless there be some particular jurisdictional reason, every reasonable motive should allow the relief, which would be allowed at the present day in every other form of legal proceeding, *so far as I know. No one wants gratuitously to impose upon naturalization proceedings that technical spirit*

*which easily follows a literal application of so detailed a statute, and which results in vexations, disappointments and in needless irritation to a defenseless class of persons necessarily left to the guidance of officials, except in so far as the courts may mitigate the rigors of their interpretation. The decisions in question have, therefore, all depended upon the supposed jurisdictional nature of the requirement. * * * Obviously, unless the rule is that every statement is vital to the whole, the court must determine from their character, which statements Congress intended to be crucial, and this must depend upon the substantive significance of the statement itself."*

Though there is wide difference of opinion as to the precise point decided by Judge Hand, just referred to, his statement as to the importance of liberality in exercising the right to amend in general in naturalization cases has been repeatedly approved

Banning v. *Penrose*, 255 Fed., at 161
In re Pollock, 257 Fed., at 352
In re Maney, 13 F. (2nd), at 665

In the following cases provisions no less specific than those now under consideration have been held to be directory merely, and in most of them French v. *Edwards (supra) was cited:*

Western Electric Co. v. *North Electric Co.*, 135 Fed. 79 (C. C. A.) a patent case, Lurton, J., being one of the bench
United States v. *De Visser*, 10 Fed. 642, 648-649 (quoting *United States* v. *Kirkpatrick*, 9 Wheaton 720, Story, J.)
Lansburgh v. *McCormick*, 224 Fed. 874, 879 (C. C. A.)
Idaho Co. v. *Monk*, 218 Fed. 682, 684
Lancaster Co. v. *New York*, 214 N. Y. 112

In 36 *Cyc.* 1157-1160, it is well said:

> "Whether a particular statute is mandatory or directory does not depend upon its form, but upon the intention of the legislature, to be ascertained from a consideration of the entire act, its nature, its object, and the consequences that would result from construing it one way or the other. * * * A provision of course is mandatory, which is declared by the statute itself to be so. * * * Where the directions of a statute are given merely with a view to the proper, orderly and prompt conduct of business, the provision may generally be regarded as directory. * * * A statute specifying a time within which a public officer is to perform an act regarding the rights and duties of others is directory merely."

In *Fields* v. *United States*, 27 App. D. C. 433, 440, the Court of Appeals well said:

> *"Words like may, must, shall, and so forth, are constantly used in statutes, without intending that they shall be taken literally, and in the construction, the object evidently designed to be reached limits and controls the literal import of the terms and phrases employed."*

(Certiorari was refused in 205 U. S. 292.)

SEVENTH.

The decision of this Court is likely to give rise to thousands of proceedings to cancel, involving purely technical variances from the statute, and to cause grave hardship after the lapse of many years after the rendition of decrees of naturalization and the accrual of vested rights in property and of status.

It is difficult to gauge the limits of this decision. In the Southern District of New York, for instance, no technical defect has been regarded as unamendable, other than an error in the so-called First Papers, stating the country of original allegiance, and it is safe to say that there is

scarcely a naturalization case in which some technical flaw may not be found. While the hardship to the petitioner in the present case may not be very great, it is incalculable in the cases of many thousands of persons whose naturalization is likely to be attacked at any time, however remote from the granting of the decree, for purely technical reasons. This would affect the wives and children of persons since deceased, whose citizenship is derivative, and would apply to cases in which evidence of requisite residence can no longer be established by the necessary witnesses found in the district. It is, in fact, almost impossible to specify all the circumstances of hardship which would result from the vacation of decrees of naturalization, though some of them are outlined in several of the cases cited above, and some of them were graphically portrayed at a recent meeting of the American Society of International Law (Proceedings of 1925, pp. 80 *et seq.*). It is also unfortunately true that in districts where a strong anti-alien feeling at times prevails, Government officials are prone to take most unwise and heartless action in the exercise of a supposed discretion in immigration and naturalization cases. Consequently, the decision rendered in this case, unless qualified or limited, will give rise to a multitude of oppressive proceedings to vacate naturalization. Furthermore, since the Government is represented by able and experienced representatives in the naturalization courts, and the applicant in comparatively few instances has the benefit of counsel, every comment or intimation contained in the opinions of this Court in naturalization cases is promptly seized upon by naturalization examiners to restrict unduly the rights of applicants for naturalization or of supposedly naturalized citizens.

EIGHTH.

In holding the certificate herein void because ninety days' posting can begin only from the time the Certificate of Arrival is filed, this Court overlooked the fact that no such question was raised by the Government's petition, nor by the Government's assignment of errors or briefs below, nor in the Naturalization Court, and hence petitioner's counsel failed to call attention to material statutes, rules, facts and decisions bearing on this subject.

On this branch of the case, the Court has, it is respectfully submitted, decided a question in no way open here. The only question raised by the Government's petition to cancel, under Section 15, was the failure to file the certificate, and not the slightest reference was made to posting (Record, p. 2). The petitioner raised the only issues Mrs. Maney was called upon to meet (*United States* v. *Salomon*, 231 Fed. 928, at 929 [C. C. A.]; *United States* v. *Rockteschell*, 208 Fed. 531 [C. C. A.]; *United States* v. *Knight*, 291 Fed. 129, 131, aff'd 299 Fed. 571). Mrs. Maney having prevailed in the District Court, the Government was bound under the statute to set forth alleged errors it relied on in its assignment of errors on appealing to the United States Circuit Court of Appeals, but no suggestion of inadequate posting was assigned as error (Record, pp. 18-19). Nor was any such question urged in the Government brief below (nor in its brief in this Court, except *arguendo* by way of suggestion), nor did the lower courts decide any such question, so such objection was waived (*Hull* v. *Burr*, 234 U. S. 712, 722).

In the District Court, in the original naturalization proceedings, the Naturalization Examiner specifically limited his objection to non-attaching of the certificate of arrival to the petition (Record, p. 7), and did not make the slightest reference to improper posting. Had he done so, *non constat* the Court would have complied with the rule ap-

plicable to such case, not heretofore called to the Court's attention, reading (Rule 1, subd. B, par. 5):

> "*The officers designated* in paragraph 4 hereof [naturalization examiners and their superiors], *before proceeding to the final hearing of any petition for naturalization, shall require proof of the posting of such petition in accordance with law, and in default of such proof shall move that the final hearing on such petition be continued pending the submission of such proof of posting.*"

Had the objection been taken, the Court doubtless might have required twenty days' additional posting. By not taking the objection, the Government waived the objection. This rule clearly indicates that the alleged defect was not regarded as jurisdictional.

Moreover, as already pointed out, the statute gives the clerk thirty days' time to send a copy of the petition to the Bureau at Washington after its filing (Sec. 12), so that the statute itself treats this matter as merely declaratory, at least where the delay is less than thirty days, and failure to ask a continuance shows that the twenty days' delay in filing the certificate was made up by greater expedition on the clerk's part. The whole posting provision was treated as declaratory merely in *United States* v. *Solomon*, 231 Fed. 461, at 463; aff'd 231 Fed. 928 (C. C. A.).

More important is the fact, above referred to, that the Court overlooked the circumstance *that the petition contains all the facts required to be stated in the certificate of arrival*, so that failure to file the certificate in time in no way interfered with posting the matters referred to in the posting section (Sec. 5), to wit, "name, nativity and residence of the alien, the date and place of his arrival in the United States, and the date as nearly as may be, for the final hearing of his petition and the names of the witnesses whom the applicant expects to summon in his behalf." It is further submitted, that legal posting ought not to be regarded as vitiated for failure to attach the certificate of arrival, if the latter may be legally filed *nunc*

pro tunc, under the analogies afforded by innumerable cases authorizing amendment of process in "substituted service" cases.

> 32 *Cyc.* 536-537.
> *King* v. *Davis*, 137 Fed. 198, aff'd 157 Fed. 676;
> *Arndt* v. *Griggs*, 134 U. S. 316.
> *Sage* v. *Central R. Co.*, 99 U. S. 334.
> *Nickerson* v. *Warren Co.* 223 Fed. 843.
> 1m. d *Eng. Anno. Cases*, 1915D, pp. 526-649.

NINTH.

Through inadvertence, petitioner's counsel failed to call the Court's attention to the fact that the legislative history of Section 15 of the Naturalization Act shows unmistakably that Congress intended to permit naturalization decrees to be vacated solely for want of jurisdiction or for fraud, and this Court's decision herein overlooked the limitations placed on Section 15 in *United States* v. *Ness*, 245 U. S. at 325-326, and in *Tutun* v. *United States*, 270 U. S. 568.

Congress realized that the words in Section 15 authorizing cancellation of naturalization certificates not merely for "fraud" but because "illegally procured" were indefinite and equivocal but it clearly used them in a very limited and restricted sense, and so as to be merely declaratory of existing law. This was clearly indicated by a colloquy between Congressman Fitzgerald and Congressman Bonynge (the latter having been chairman of the committee that drafted the bill, and having had chief charge of it in the House), as follows (*Congressional Record*, Vol. 40, Part 8, p. 7874):

> "Mr. Fitzgerald. The original section [in the bill as reported] provided that this proceeding might be brought for fraud or for illegality in the issuance of the certificate?
>
> Mr. Bonynge. Yes.

Mr. Fitzgerald: Are those clauses retained?
Mr. Bonynge: *They remain, and under existing law it can be done now, as decided by the federal courts.*"

The case of *United States* v. *Gleason*, 78 Fed. 396, aff'd 90 Fed. 778 (Lacombe, J., writing, Wallace, J., dissenting), was almost *sui generis*, in denying relief, prior to the Act of 1906, to cancel a decree of naturalization by suit in equity for fraud, the great weight of authority having been in favor of the right to do so where fraud was involved, or where there was an actual want of jurisdiction (*United States* v. *Nordsch*, 42 Fed. 417; *United States* v. *Kornmehl*, 89 Fed. 10; *Pinsch Co.* v. *Bergin*, 84 Fed. 140; *Scott* v. *Strobach*, 49 Ala. 477, 488; *People* v. *McGowan*, 77 Ill. 644; *McCurren* v. *Cooper*, 16 N. Y. App. Div. 311, approving *United States* v. *Nordsch*, *supra*, and affirmed on opinion below, 162 N. Y. 654; *State ex rel. Lacy* v. *Brandhorst*, 156 Mo. 457; *Tinns* v. *United States District Attorney*, 148 Cal. 793; *Andre* v. *Arnold*, 77 Mich. 85; *Mills* v. *McCafe*, 44 Ill. 194; *Behrensmeyer* v. *Kratz*, 135 Ill. 591, 630; *State ex rel. Bancroft* v. *Stumpf*, 23 Wis. 630; *Spratt* v. *Spratt*, *supra*; 2 *Corpus Juris*, 1124-1125). Even the facts involved in *United States* v. *Ginsberg*, *supra*, action by a court elsewhere than in open court, was previously held to be action without jurisdiction in *Behrensmeyer* v. *Kratz*, *supra*. The cases, however, sharply distinguished between actual want of jurisdiction and fraud on the one hand, and mere irregularity on the other, according relief in the former class of cases, and denying it in the latter. This Court, in *Johannesen* v. *United States*, 225 U. S. 227, at 236, 240, held that the decisions antedating the Act of 1906 merely forbade *collateral* attack of a decree of naturalization, and recognized that even the decision in the case of *United States* v. *Gleason*, *supra*, may be thus sustained, because the attack there was collateral, in that a State court decree was assailed in a Federal court. The Act of 1906 in Section 15 being thus merely declaratory of subsisting law, except in as far as it conferred jurisdiction on the Federal courts to hear such suits, the words

"illegally procured" ought to be limited, in accordance with the legislative intention, to actual want of jurisdiction, and not merely for irregularity.

In the report of the committee which accompanied the bill in the House (59th Congress, 1st Session, House Report No. 1789, p. 7), it is said of the cancellation section that it simply "prescribes proceedings for cancellation of *fraudulent* certificates of naturalization."

The limited and narrow jurisdiction conferred by Section 15, as distinguished from an appeal, was clearly expressed by this Court in *United States* v. *Ness*, 245 U. S. 319, at pages 325 326, where it was said:

> *"The remedy afforded by Sec. 15 • • • is narrower in scope than the protection offered under Sec. 11. Opposition to the granting of a petition for naturalization may prevail, because of objections to the competency or weight of evidence or the credibility of witnesses or mere irregularities in procedure. A decision on such minor questions, at least of a state court of naturalization, is, though clearly erroneous, conclusive as against the United States, if it entered an appearance under Sec. 11."*

Again, in *Tutun* v. *United States*, 270 U. S. 568, at 579, it was said by this Court:

> *"The remedy afforded to the government by Sec. 15 is narrower in scope than the review commonly afforded by appellate courts."*

See also *Spratt* v. *Spratt*, 4 Peters 393, *supra*.

These passages were overlooked by the Court in the instant case, which affords a practically unlimited remedy to vacate certificates of naturalization "illegally procured," where mere irregularity is involved.

The passages from the two cases cited have repeatedly been applied by United States Circuit Courts of Appeals since then, and in almost countless *nisi prius* decisions.

> *United States* v. *Milder*, 284 Fed. 571, at 572 (C. C. A., 8th Cir.).
>
> *United States* v. *Tiem*, 299 Fed. 582, 583 (C. C. A., 9th Cir.).

United States v. *Richmond*, 17 Fed. (2nd) 28, at 29, 32 (C. C. A., 3rd Cir.).

United States v. *Sakharam Ganesh Pandit*, 15 Fed. (2nd) 285 (C. C. A., 9th Cir.); certiorari refused, 273 U. S. 759.

United States v. *Srednik*, 19 Fed. (2nd) 71 (C. C. A., 3rd Cir.).

United States v. *Orens*, 13 Fed. (2nd) 376 (C. C. A., 4th Cir.).

United States v. *Javier*, 22 Fed. (2nd) 879, 880 (App. D. C.).

United States v. *Gokhale*, 26 Fed. (2nd) 360, 361 C. C. A., 2nd Cir.) (certiorari granted).

TENTH.

Wherefore, your petitioner prays that a rehearing be directed, or, if the same be not granted, that the opinion of the Court be limited by a supplemental opinion (cf. *Arndstein* v. *McCarthy*, 254 U. S. 379), and that your petitioner have such other and further relief as may be proper.

And your petitioner will ever pray, etc.

ANNA MARIE MANEY,
by BRUNO V. BITKER,
Her Attorney.

LOUIS MARSHALL,
MAX J. KOHLER,
BRUNO V. BITKER,
of Counsel.

I HEREBY CERTIFY that I have examined the foregoing petition; that in my opinion it is well founded, and that it is presented in good faith and not for delay.

Dated November 12, 1928.

LOUIS MARSHALL,
of Counsel for Petitioner.

APPENDIX.

SUPREME COURT OF THE UNITED STATES.

No. 27.—October Term, 1928.

Anna Marie Maney, Petitioner, vs. The United States of America.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[October 22, 1928.]

Mr. Justice Holmes delivered the opinion of the Court.

The petitioner obtained a certificate of naturalization by a decree of a District Court of the United States in February, 1924. In June, 1925, the United States filed a petition to have the certificate cancelled on the ground that it was illegally procured. The District Court dismissed the Government's suit, 13 F. (2d) 662. But this decision was reversed by the Circuit Court of Appeals and an order cancelling the certificate of naturalization was directed. 21 F. (2d) 28. A writ of certiorari was granted by this Court on the 9th of January last.

The petition for naturalization was filed on November 13, 1923, but at that time there was not filed the certificate from the Department of Labor stating the date, place, and manner of arrival in the United States, and the declaration of intention of such petitioner, which the Naturalization Act of June 29, 1906, c. 3592, § 4, 34 Stat. 596 (Code, Title 8, § 380), required to be attached to and made

part of the petition. It is said that the Department of Labor did not issue the certificate until November 24, 1923, and it was not mailed to the clerk of the Naturalization Court until December 3. The hearing on naturalization took place on February 11, 1924, and the District Court, against the objection of the United States, ordered the certificate filed and attached to the petition *nunc pro tunc* as of the date when the petition was filed, and made the decree purporting to admit the petitioner to citizenship that has been annulled in the present proceeding. The petitioner says that the original decree made the question *res judicata*, and that it was right, or at least within the power of the Court.

By § 15 of the Naturalization Act, (C., § 405,) it is made the duty of district attorneys upon affidavit showing good cause therefor to institute proceedings for cancellation "on the ground that the certificate of citizenship was illegally procured." The first question is whether the certificate was illegally procured within the meaning of § 15. If the statute makes it a condition precedent to the authority of the Court to grant a petition for naturalization that the Department of Labor's certificate of arrival shall be filed at the same time, then, when it appears on the face of the record that no such certificate has been filed, a decree admitting to citizenship is bad. It is illegal in the sense that it is unauthorized by and contrary to the law. *United States* v. *Ginsberg*, 243 U. S. 472, 475. *United States* v. *Voss*, 245 U. S. 319, 324, 325.

We are of opinion that the Circuit Court of Appeals was right in holding that the filing with the petition of the certificate of arrival was a condition attached to the power of the Court. Although the proceedings for admission are judicial, *Tutun* v. *United States*, 270 U. S. 568, they are not for the usual purpose of vindicating an existing right but for the purpose of getting granted to an alien rights that do not yet exist. Hence not only the conditions attached to the grant, but those attached to the power of the instrument used by the United States to make the grant must be complied with strictly, as in other instances of Government gift. By § 4 of the Act an

alien may be admitted to become a citizen of the United States in the manner prescribed, "and not otherwise." And by the same section the certificate from the Department of Labor is to be filed "at the time of filing the petition." (C., §§ 372, 379.) The form provided by § 27 (C., § 409) alleges that the certificate is attached to and made a part of the petition. The Regulations of the Secretary of Labor embodied our interpretation of the law, and would have warned the petitioner if she had consulted them. Rule 5, Ed. February 15, 1917; Ed. September 24, 1920. *United States* v. *Ness*, 245 U. S. 319, 323. It already has been decided that the filing of the certificate is an essential prerequisite to a valid order of naturalization, *United States* v. *Ness*, *sup.*, and that a hearing in chambers adjoining the courtroom does not satisfy the requirement of a hearing in open Court. *United States* v. *Ginsberg*, 243 U. S. 472. The reasoning that prevailed in those cases must govern this. A hearing in less than ninety days from the public notice required by § 6 (Code, § 396) surely would have been as bad as a hearing in chambers. But as it has been decided that no valid decree could be made until the certificate was filed and as the hearing took place and the decree was entered in less than ninety days from the time when the certificate was received the want of power seems to us doubly plain. If after the certificate came the petition had been refiled, a new notice had been given and ninety days had been allowed to elapse before the hearing there would be a different case.

It is said that the District Court had control of procedural matters and could cure formal defects. Very likely it had power to cure defective allegations but it had not power to supply facts. If, as we decide, the petitioner was required to file the Department of Labor's certificate at the same time that she filed her petition, the District Court could not cure her failure to do so and enlarge its own powers by embodying in an order a fiction that the certificate was filed in time.

As the certificate of citizenship was illegally obtained, the express words of § 15 authorize this proceeding to have it cancelled. The judgment attacked did not make the

matter *res judicata*, as against the statutory provision for review. The difference between this and ordinary cases already has been pointed and would be enough to warrant a special treatment. But it hardly can be called special treatment to say that a record that discloses on its face that the judgment transcends the power of the judge may be declared void in the interest of the sovereign who gave to the judge whatever power he had.

Judgment affirmed.

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In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 636

ANNA MARIE MANEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court may be found at page 7 of the record.

The opinion of the Circuit Court of Appeals is reported in 21 F. (2d) 28.

JURISDICTION OF THIS COURT

The judgment sought to be reviewed was entered on June 16, 1927. A petition for rehearing was filed and entertained, but denied on September 22, 1927. The petition for certiorari was filed in this Court on December 6, 1927.

The jurisdiction of this Court to issue the writ prayed for is conferred by the Act of February 13, 1925.

QUESTIONS PRESENTED

Three questions are presented: (1) Whether in naturalization proceedings a court may permit the certificate of arrival to be filed subsequent to the filing of the petition for naturalization, although the statute requires simultaneous filing; (2) whether naturalization procured where a certificate of arrival was not filed with the petition, but later, is illegally procured within the meaning of Section 15 of the Naturalization Act, so as to support a suit for cancellation; and (3) whether the facts that the United States appeared in the naturalization proceeding and objected to the granting of naturalization on the ground that the certificate of arrival was not filed with the petition, and the question was decided against it in the naturalization court, render the matter *res judicata*, so as to estop the United States to raise the same point in the cancellation suit.

STATUTES INVOLVED

Section 4 of the Naturalization Act of June 29, 1906, c. 3592, 34 Stat. 596, 597 (U. S. C., Title 8, Sec. 380), so far as pertinent reads as follows:

> At the time of filing his petition there shall be filed with the clerk of the court a certificate from the Department of Labor, if the petitioner arrives in the United States after the passage of this act, stating the date, place, and manner of his arrival in the

United States, and the declaration of intention of such petitioner, which certificate and declaration shall be attached to and made a part of said petition.

Section 5 of the same Act (U. S. C., Title 8, Sec. 397) reads in part as follows (p. 598):

That the clerk of the court shall, immediately after filing the petition, give notice thereof by posting in a public and conspicuous place in his office, or in the building in which his office is situated, under an appropriate heading, the name, nativity, and residence of the alien, the date and place of his arrival in the United States, and the date, as nearly as may be, for the final hearing of his petition, and the names of the witnesses whom the applicant expects to summon in his behalf * * *

Section 15 of the Act, as amended (U. S. C., Title 8, Sec. 405), is as follows (p. 601):

That it shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of bringing the suit, for the purpose of setting aside and canceling the certificate of citizenship on the ground of fraud or on the ground that such certificate of citizenship was illegally procured. In any such proceedings the party holding the certificate of citizenship alleged to have been fraudu-

lently or illegally procured shall have sixty days' personal notice in which to make answer to the petition of the United States; and if the holder of such certificate be absent from the United States or from the district in which he last had his residence, such notice shall be given by publication in the manner provided for the service of summons by publication or upon absentees by the laws of the State or the place where such suit is brought.

If any alien who shall have secured a certificate of citizenship under the provisions of this act shall, within five years after the issuance of such certificate, return to the country of his nativity, or go to any other foreign country, and take permanent residence therein, it shall be considered prima facie evidence of a lack of intention on the part of such alien to become a permanent citizen of the United States at the time of filing his application for citizenship, and, in the absence of countervailing evidence, it shall be sufficient in the proper proceeding to authorize the cancellation of his certificate of citizenship as fraudulent, and the diplomatic and consular officers of the United States in foreign countries shall from time to time, through the Department of State, furnish the Department of Justice with the names of those within their respective jurisdictions who have such certificates of citizenship and who have taken permanent residence in the country of their nativity, or in any other foreign country, and such state-

ments, duly certified, shall be admissible in evidence in all courts in proceedings to cancel certificates of citizenship.

Whenever any certificate of citizenship shall be set aside or canceled, as herein provided, the court in which such judgment or decree is rendered shall make an order canceling such certificate of citizenship and shall send a certified copy of such order to the Bureau of Naturalization; and in case such certificate was not originally issued by the court making such order it shall direct the clerk of the court to transmit a copy of such order and judgment to the court out of which such certificate of citizenship shall have been originally issued. And it shall thereupon be the duty of the clerk of the court receiving such certified copy of the order and judgment of the court to enter the same of record and to cancel such original certificate of citizenship upon the records and to notify the Bureau of Naturalization of such cancellation.

The provisions of this section shall apply not only to certificates of citizenship issued under the provisions of this act, but to all certificates of citizenship which may have been issued heretofore by any court exercising jurisdiction in naturalization proceedings under prior laws.

STATEMENT

This is a suit instituted by the United States June 24, 1925, in the United States District Court for the Eastern District of Wisconsin under Sec-

tion 15 of the Naturalization Act, to cancel a certificate of naturalization granted to this petitioner on February 11, 1924, in the same United States District Court. The petition for naturalization was filed November 13, 1923, but it was not accompanied by the certificate of arrival, as required by Section 4 of the Naturalization Act. The certificate was not in fact filed with the Clerk of the United States District Court until December 3, 1923. (R. 3.) The opinion of the trial court states that twenty days after the petition for naturalization was filed, and on December 3, 1923, the certificate of arrival was mailed to the clerk by the district director of naturalization. (R. 8.) The affidavit attached to the petition for cancellation in this case states that the certificate of arrival was not issued until November 24, 1923. (R. 5.) The clerk of the naturalization court must have executed the petition by filing and posting the notice and taking other steps provided by law before the certificate of arrival was filed, because the final hearing appears to have occurred on February 11, 1924, less than ninety days after December 3, 1923, and Section 6 of the Act (U. S. C., Title 8, Sec. 386) provides that no final action shall be had until at least ninety days have elapsed after filing and posting the notice of the petition. When the petition for naturalization came on for hearing, a naturalization examiner, on behalf of the United States, appeared and objected to the granting of the petition, not only because the certificate of arrival was not attached to and made a part of the petition when filed, but "because

the said certificate of arrival was not filed with" the petition. (R. 5.)

The trial court, apparently recognizing the binding effect of the statutory requirement as to the time when the certificate of arrival must be filed, undertook to cure the failure to file it in time by a *nunc pro tunc* order (R. 6), and naturalization was granted against the opposition of the United States. Thereafter the United States instituted this suit, under Section 15, to cancel the certificate, alleging not only that the certificate of arrival was not physically attached to the petition until February 11, 1924, but that "no such certificate was filed with the Clerk of said Court until the 3rd day of December, 1923." The affidavit attached to the petition in this case and made a part of it (R. 2) discloses that the question whether the failure to file the certificate in time operated to prevent naturalization was raised by the United States and decided in the naturalization proceeding. The answer of this petitioner also alleges that the point raised in the cancellation suit was raised and decided in the naturalization proceeding. (R. 6.) The District Court held that the naturalization court had power to disregard the failure to file the certificate of arrival with the petition for naturalization and to accept the later filing as sufficient, and that it was sufficient that the certificate was before the court at the time naturalization was granted. The United States appealed, and the Circuit Court of Appeals held that the failure to file the certificate with the peti-

tion made the naturalization one "illegally procured" so as to support a suit under Section 15 to cancel.

ARGUMENT

The first question presented is whether the failure to file the certificate of arrival until twenty days after the petition for naturalization was filed should have operated to defeat the petition. If that question is answered in the affirmative, the questions then arising are whether the defect was of such a nature as to make the naturalization one illegally procured within the meaning of Section 15 so as to support a suit for cancellation, and whether, even if such a suit may be maintained, the question is *res judicata* as against the United States because it appeared in the naturalization proceeding and the effect of the delay in filing the certificate of arrival was there litigated and decided against it.

(1) On the first point there should be little difficulty. Although the form of petition for naturalization which the petitioner executed showed clearly that the certificate of arrival should have been filed with it, and the omission was her fault, the case may have seemed a hard one, but that should not make bad law. If a naturalization court is to be permitted, in its discretion, to dispense with the specific requirements of the Naturalization Act because it believes that in the case before it there is no reason why they should not be dispensed with, the evils which the Naturalization Act of 1906 was intended to remedy will again arise.

That all the requirements of the Naturalization Act are to be strictly adhered to is no longer open to dispute. In *United States* v. *Ginsberg*, 243 U. S. 472, 474, 475, holding that the requirement of a hearing in open court was not complied with by a hearing in the judge's chambers even though the chambers adjoin the court room, this Court said:

> An alien who seeks political rights as a member of this Nation can rightfully obtain them only upon terms and conditions specified by Congress. Courts are without authority to sanction changes or modifications; their duty is rigidly to enforce the legislative will in respect of a matter so vital to the public welfare.
>
> * * * * *
>
> No alien has the slightest right to naturalization unless all statutory requirements are complied with; and every certificate of citizenship must be treated as granted upon condition that the Government may challenge it as provided in §15 and demand its cancellation unless issued in accordance with such requirements. If procured when prescribed qualifications have no existence in fact it is illegally procured; a manifest mistake by the judge can not supply these nor render their existence nonessential.

In *United States* v. *Ness*, 245 U. S. 319, 323, 324, a certificate of arrival was not filed either with the petition or at any subsequent time, but the very basis of the holding in that case makes it reasonably clear that this Court was of the view that the cer-

tificate of arrival must be filed as required by the statute, viz, at the time of filing the petition, and not otherwise. This Court said, in dealing with the requirement and its purposes (pp. 323, 324):

> Section 6 prohibits courts from taking final action upon any petition until 90 days after such notice has been given. That period is provided so that the examiners of the Bureau of Naturalization and others may have opportunity for adequately investigating whether reasons exist for denial of the petition. The certificate of arrival is the natural starting point for this investigation. It aids in ascertaining (a) whether the petitioner was within any of the classes of aliens who are excluded from admission by §§ 2 and 38 of the Immigration Act of February 20, 1907, 34 Stat. 898; (b) whether he is among those who are excluded from naturalization under § 7 of the Naturalization Act—for political beliefs or practices; (c) whether he is the same person whose declaration of intention to become a citizen is also attached to the petition under § 4, subdivision second; (d) whether the minimum period of five years' continuous residence prescribed by § 4, subdivision fourth, has been complied with. The certificate of arrival is in practice deemed so important that in the regulations issued by the Secretary of Labor under § 28 " for properly carrying into execution the various provisions " of the act, the clerk of court is advised that he " should not commence the exe-

cution of the petition until he has received the certificate of arrival."

Filing the certificate of arrival being a matter of substance, it is clear that no power is vested in the naturalization court to dispense with it. Section 4 declares: "That an alien may be admitted to become a citizen of the United States in the following manner and not otherwise." Section 27 declares: "That substantially the following forms shall be used in the proceedings to which they relate"; and the form of petition therein prescribed recites: "Attached hereto and made a part of this petition" is "the certificate from the Department of (Commerce and) Labor required by law." Experience and investigation had taught that the widespread frauds in naturalization, which led to the passage of the Act of June 29, 1906, were, in large measure, due to the great diversities in local practice, the carelessness of those charged with duties in this connection, and the prevalence of perjured testimony in cases of this character. A "uniform rule of naturalization" embodied in a simple and comprehensive code under federal supervision, was believed to be the only effective remedy for then existing abuses. And, in view of the large number of courts to which naturalization of aliens was entrusted and the multitude of applicants, uniformity and strict enforcement of the law could not be attained unless the code prescribed also the exact character of proof to be adduced. The value of contemporary documentary evidence was

> recognized; and the certificate of arrival was, therefore, specifically included among the prerequisites to naturalization. • • •

See *In re Olsen*, 18 F. (2d) 425, 426, and *In re Liberman*, 193 Fed. 301, 302.

If the certificate is the natural starting point for an investigation not only by Government officers, but by others who may be interested, such an investigation can not be efficiently conducted where the certificate is not filed with the petition and is not on file when the notice of hearing is given and need not be filed and attached until the final hearing.

As showing how strictly other courts have enforced the various requirements of the statute, reference may be made to the following cases:

In *Ex parte Lange*, 197 Fed. 769, Lange had failed to state in his declaration of intention the name of the sovereign of which he was a subject, but the court in the naturalization hearing held it had no power to permit the omitted matter to be supplied by amendment.

A similar situation existed in *In re Stack*, 200 Fed. 330; *In re Friedl*, 202 Fed. 300; and *In re Lewkowicz*, 169 Fed. 927.

The matter is well summed up in the following excerpt from the opinion of the Circuit Court of Appeals below:

> Paragraph Second of Section 4 provides *when* the certificate shall be filed. Section 9 provides *where* the hearing shall be had. It

> does not seem that there should be any more importance attached to the "when" the petition shall be filed than the "where" the hearing is to be had. Each provision is for the purpose of preventing a possible wrong, and the fact that in neither case can it be shown that a wrong has followed the disregard of the provision is aside from the question. The stringent provisions of the act are intended to prevent in advance any recurrence of those abuses that arose before the act because of the too liberal exercise of discretion on the part of the courts administering the law. We are of opinion that there was no discretion to permit a departure from one of the simple, but important, provisions of the act, and that the naturalization certificate in this case was illegally obtained.

The integrity and effectiveness of the Act will be best served by a continuance of this Court's insistence upon a strict and rigid enforcement of its provisions.

The conclusion of the Circuit Court of Appeals that the failure to file the certificate of arrival with the petition made the granting of the petition improper appears to be sound.

(2) The next question is whether the defect in the naturalization proceeding was such as to make the naturalization one "illegally procured" within the meaning of Section 15 so as to support an independent cancellation suit.

In *United States* v. *Ness, supra,* a suit was brought under Section 15 to cancel a certificate of naturalization issued by a State court. The defect in the naturalization proceeding was the failure to file a certificate of arrival. The court held that the naturalization was illegally procured within the meaning of Section 15 and that the defense of *res judicata* based on the fact that the United States had appeared in the naturalization court and objected on the ground that the certificate had not been filed could not be sustained. The difference between that case and this is that here the certificate of arrival was filed before the hearing, while in the *Ness case* it was not filed at all, but the reasoning of the Court in the *Ness case* leads to the conclusion that a certificate of arrival filed for the first time at the hearing, or filed between the date of the filing of the petition and the date of hearing, presents the same objections as if not filed at all. This is disclosed by the reasons assigned by the Court for requiring the certificate to be filed.

In re *Liberman, supra,* holds that if the certificate is not filed when the petition is filed, the proceeding is a nullity and the applicant must proceed anew by filing a new petition. See also *Ex Parte Eberhardt*, 270 Fed. 334. As to what constitutes illegal procurement, see also *United States* v. *Ginsberg*, 243 U. S. 472. There is difference of opinion as to what is meant by those words, but

unless the *Ness case* may be distinguished from this because of the differences above stated, that decision disposes of this case.

The decisions of the lower Federal courts as to what is meant by the words "illegally procured" in Section 15 are collected in a note to Section 405 of Title 8, United States Code Annotated, published by the *West Publishing Co.* and the *Edward Thompson Co.*

(3) The defense of *res judicata* was properly raised in the pleadings in this case. The facts on which it is based appear in the petition for cancellation and the defense is set up in the answer. Some uncertainty now exists as to the extent to which judgments in naturalization proceedings estop the United States to litigate in suits under Section 15 questions raised by it and decided against it in the naturalization proceedings.

In *United States* v. *Pandit*, 15 F. (2d) 285, suit was brought under Section 15 to cancel a naturalization certificate granted a Hindu, it having been held by this Court that Hindus are ineligible. The Circuit Court of Appeals held that since the United States had appeared in the State court of California, in which the naturalization took place, and objected to the naturalization on the ground of ineligibility and the judgment had gone against it in that court, it was estopped to litigate the same question in the cancellation suit. This decision

seemed to be squarely in conflict with the decision of this Court in *United States* v. *Ness, supra,* and accordingly the United States filed a petition for certiorari in the *Pandit case* to review the decision of the Circuit Court of Appeals on that point. The question of laches on the part of the Government in instituting cancellation suit was presented in the case, but it seems so clear that laches could not be asserted against the United States that the basis of the Government's petition and supporting brief was the decision of the Circuit Court of Appeals holding that the question of eligibility was *res judicata.* The petition for certiorari was denied. (273 U. S. 759.) We infer that the denial of the petition was for some reason other than agreement with the Circuit Court of Appeals on the question of *res judicata.* Some of the United States District Courts and Circuit Courts of Appeals have been entertaining suits under Section 15 to cancel naturalization certificates on grounds litigated by the United States in the naturalization proceeding, and other courts are applying the rule of *res judicata.* (*United States* v. *Ovens,* 13 F. (2d) 376; *United States* v. *Milder,* 284 Fed. 571; *United States* v. *Mulvey,* 232 Fed. 513; *United States* v. *Yeles,* 236 Fed. 784; *United States* v. *Srednik,* 19 F. (2d) 71; *United States* v. *Ali,* 20 F. (2d) 998.) Of course the attack on Pandit's naturalization was not on procedural grounds, but on the fundamental ground of ineligibility.

While we construe the decision in *Tutun* v. *United States*, 270 U. S. 568, as allowing appeal by the United States from an order of a United States District Court granting naturalization as well as an appeal by the petitioner from an order refusing naturalization, appeals in the State courts may only be taken where the State law permits it, as there is no Federal statute allowing appeal in naturalization cases in the State courts, even if Congress has power to provide for it. In many States no such appeals are allowed by State law. The decisions of *nisi prius* State courts in naturalization proceedings in which the United States appears would therefore be final, unless reviewable by this Court on certiorari under Section 237(b) of the Judicial Code, if the United States may not institute cancellation proceedings under Section 15.

The correct rule probably is that although, as held in *Tutun* v. *United States*, naturalization proceedings are judicial proceedings, with all the attributes of such proceedings, and but for Section 15 all matters litigated and decided in naturalization proceedings in which the United States appears would be *res judicata*, Section 15 was intended to abrogate that rule in respect of cases within the scope of Section 15—that is, cases where the naturalization was obtained by fraud or otherwise "illegally procured"—so that the real question in this case, and in cases like it, is whether the ground

for cancellation is one contemplated by Section 15. If it is, then it would seem to follow that the plea of *res judicata* may not be sustained, because Section 15 contemplates it shall not be availed of.

Respectfully submitted.

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O. R. LUHRING,
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Attorney.

DECEMBER, 1927.

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In the Supreme Court of the United States

OCTOBER TERM, 1928

No. 27

ANNA MARIE MANEY, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court appears at page 6 of the record.

The opinion of the Circuit Court of Appeals (R. 23) is reported in 21 F. (2d) 28.

JURISDICTION OF THIS COURT

The judgment to be reviewed was entered on June 16, 1927. (R. 32.) A petition for rehearing was filed and entertained but denied on September 22, 1927. (R. 34.) Petition for certiorari was filed December 6, 1927, and granted January 9,

1928 (R. 35), pursuant to the provisions of the Act of February 13, 1925.

The questions presented

The questions presented are:

1. Whether the requirement in the Naturalization Act that the certificate of arrival shall be filed with the petition and remain on file until the hearing is one which a naturalization court may dispense with in its discretion.

2. Whether the failure to file the certificate of arrival with the petition, and the action of the naturalization court in granting naturalization without compliance with that requirement, makes the naturalization "illegally procured" within the meaning of Section 15 of the Naturalization Act so as to support a suit for cancellation.

3. Whether, if a cancellation proceeding is within the scope of Section 15 and authorized by it, the fact that the United States, through its naturalization examiner, appeared in the naturalization proceeding and objected to the granting of naturalization on the same ground asserted in the cancellation suit renders the matter *res judicata* so as to defeat the cancellation proceedings.

STATUTES INVOLVED

Section 1 of the Naturalization Act of June 29, 1906, c. 3592, 34 Stat. 596 (U. S. C. Title 8, Sec. 106), so far as pertinent, reads as follows:

> * * * That it shall be the duty of the said Bureau [of Immigration] to provide, for use

at the various immigration stations throughout the United States, books of record, wherein the commissioners of immigration shall cause a registry to be made in the case of each alien arriving in the United States from and after the passage of this Act of the name, age, occupation, personal description (including height, complexion, color of hair and eyes), the place of birth, the last residence, the intended place of residence in the United States, and the date of arrival of said alien, and, if entered through a port, the name of the vessel in which he comes. And it shall be the duty of said commissioners of immigration to cause to be granted to such alien a certificate of such registry, with the particulars thereof.

Section 4, *idem* (U. S. C., *idem*, Secs. 372, 379, and 380), reads in part as follows:

That an alien may be admitted to become a citizen of the United States in the following manner and not otherwise:

* * * * *

Second. Not less than two years nor more than seven years after he has made such declaration of intention he shall make and file, in duplicate, a petition in writing, signed by the applicant in his own handwriting and duly verified * * *.

* * * * *

At the time of filing his petition there shall be filed with the clerk of the court a certificate from the Department of * * * Labor, if the petitioner arrives in the United

States after the passage of this Act, stating the date, place, and manner of his arrival in the United States, and the declaration of intention of such petitioner, which certificate and declaration shall be attached to and made a part of said petition.

Sections 5 and 6, *idem* (U. S. C., *idem*, Secs. 396 and 397), provide in part as follows:

SEC. 5. That the clerk of the court shall, immediately after filing the petition, give notice thereof by posting in a public and conspicuous place in his office, or in the building in which his office is situated, under an appropriate heading, the name, nativity, and residence of the alien, the date and place of his arrival in the United States, and the date, as nearly as may be, for the final hearing of his petition, and the names of the witnesses whom the applicant expects to summon in his behalf; and the clerk shall, if the applicant requests it, issue a subpoena for the witnesses so named by the said applicant to appear upon the day set for the final hearing, but in case such witnesses can not be produced upon the final hearing other witnesses may be summoned.

SEC. 6. That petitions for naturalization may be made and filed during term time or vacation of the court and shall be docketed the same day as filed, but final action thereon shall be had only on stated days, to be fixed by rule of the court, and in no case shall final action be had upon a petition until at least

> ninety days have elapsed after filing and posting the notice of such petition * * *.

Section 11, *idem* (U. S. C., *idem*, Sec. 399), provides as follows:

> That the United States shall have the right to appear before any court or courts exercising jurisdiction in naturalization proceedings for the purpose of cross-examining the petitioner and the witnesses produced in support of his petition concerning any matter touching or in any way affecting his right to admission to citizenship, and shall have the right to call witnesses, produce evidence, and be heard in opposition to the granting of any petition in naturalization proceedings.

Section 15, *idem* (U. S. C., *idem*, Sec. 405, reads in part as follows:

> That it shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of bringing the suit, for the purpose of setting aside and canceling the certificate of citizenship on the ground of fraud or on the ground that such certificate of citizenship was illegally procured. In any such proceedings the party holding the certificate of citizenship alleged to have been fraudulently or illegally procured shall have sixty days personal notice in which to make answer to the petition

of the United States; and if the holder of such certificate be absent from the United States or from the district in which he last had his residence, such notice shall be given by publication in the manner provided for the service of summons by publication or upon absentees by the laws of the State or the place where such suit is brought.

* * * * *

Section 27, *idem* (U. S. C., *idem*, Sec. 409), provides in part as follows:

That substantially the following forms shall be used in the proceedings to which they relate:

* * * * *

In the matter of the petition of ——— to be admitted as a citizen of the United States of America.

To the ——— Court:

The petition of ——— ——— respectfully shows:

* * * * *

Attached hereto and made a part of this petition are my declaration of intention to become a citizen of the United States and the certificate from the Department of * * * Labor required by law. Wherefore your petitioner prays that he may be admitted a citizen of the United States of America.

Dated ———.

(Signature of petitioner) ———.

——— ———, *ss:*

———— ———, being duly sworn, deposes and says that he is the petitioner in the

above-entitled proceeding; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge, except as to matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

Subscribed and sworn to before me this ——— day of ———, anno Domini ———.

(L. S.)

———,

Clerk of the ——— Court.

PERTINENT REGULATIONS

Rule 5 of the September 24, 1920, edition of the Regulations of the Secretary of Labor provides, in part, as follows:

* * * The clerk of the court should not commence the execution of the petition until he has received the certificate of arrival prescribed by this regulation.

* * * * *

When a clerk of court executes a petition for naturalization for an alien who arrived in the United States before June 29, 1906, and fails to attach his declaration of intention, or, in the case of an alien who arrived after June 29, 1906, fails to attach thereto either his certificate of arrival or his declaration of intention, in accordance with the terms of section 4 of the act of June 29, 1906, no valid petition is docketed, and since the petitioner is only required to pay for the docketing of a complete petition, the petition should be marked "spoiled" and the fee held

> for the payment for a complete petition.
> * * *

Rule 5, Subdivision B, par. 1, of the June 15, 1924, edition, *idem*, reads as follows:

> No petition for naturalization of an alien who arrived in the United States subsequent to June 29, 1906, shall be accepted or filed by the clerk of a court having naturalization jurisdiction, unless there is attached to and made part of such petition a "Certificate of arrival" (Form 145 or Form 526) properly executed and showing the time, place, and manner of alien's arrival in the United States.

STATEMENT

This is a suit instituted by the United States June 24, 1925, in the United States District Court for the Eastern District of Wisconsin under Section 15 of the Naturalization Act, to cancel a certificate of naturalization granted to this petitioner on February 11, 1924, in the same United States District Court. The petition for naturalization was filed November 13, 1923 (R. 4), but it was not accompanied by the certificate of arrival, as required by Section 4 of the Naturalization Act. The certificate was not in fact filed with the Clerk of the United States District Court until December 3, 1923. (R. 2.) The opinion of the trial court states that twenty days after the petition for naturalization was filed, and on December 3, 1923, the certificate of arrival was mailed to the clerk by the district director of

naturalization. (R. 7.) The affidavit attached to the petition for cancellation in this case states that the certificate of arrival was not issued until November 24, 1923. (R. 4.) The clerk of the naturalization court must have executed the petition by filing and posting the notice and taking other steps provided by law before the certificate of arrival was filed, because the final hearing appears to have occurred on February 11, 1924, less than ninety days after December 3, 1923, and Section 6 of the Act (U. S. C., Title 8, Sec. 396) provides that no final action shall be had until at least ninety days have elapsed after filing and posting the notice of the petition. When the petition for naturalization came on for hearing, a naturalization examiner, on behalf of the United States, appeared and objected to the granting of the petition, not only because the certificate of arrival was not attached to and made a part of the petition when filed, but "because the said certificate of arrival was not filed with" the petition. (R. 5.)

The trial court, apparently recognizing the binding effect of the statutory requirement as to the time when the certificate of arrival must be filed, undertook to cure the failure to file it in time by a *nunc pro tunc* order (R. 5), and naturalization was granted against the opposition of the United States. Thereafter the United States instituted this suit, under Section 15, to cancel the certificate, alleging not only that the certificate of arrival was not physically attached to the petition until February

11, 1924, but that "no such certificate was filed with the Clerk of said Court until the 3rd of December, 1923." The affidavit attached to the petition in this case and made a part of it (R. 4) discloses that the question whether the failure to file the certificate in time operated to prevent naturalization was raised by the United States and decided in the naturalization proceeding. The answer of this petitioner also alleges that the point raised in the cancellation suit was raised and decided in the naturalization proceeding. (R. 6.)

The District Court held that the naturalization court had power to disregard the failure to file the certificate of arrival with the petition for naturalization and to accept the later filing as sufficient, and that it was sufficient that the certificate was before the court at the time naturalization was granted. The United States appealed, and the Circuit Court of Appeals held that the failure to file the certificate with the petition made the naturalization one "illegally procured" so as to support a suit to cancel under Section 15.

Summary of argument

I. Congress has specified the steps which must be taken to obtain naturalization. It has stated that an alien may be admitted "in the following manner and not otherwise." This law was enacted to correct abuses in the administration of the naturalization law, and this Court has said:

> No alien has the slightest right to naturalization unless all statutory requirements are complied with.

The requirement that a certificate of arrival shall be filed at the time the petition for naturalization is filed, and shall remain on file at least 90 days prior to the hearing, is a matter of substance. No court has power to dispense with it.

In *United States* v. *Ness*, 245 U. S. 319, this Court held that the failure to file such a certificate is a matter of substance which could not be dispensed with, and the failure justified cancellation proceedings under Section 15. The reasoning of that opinion shows that the requirement as to the time of filing the certificate of arrival is also a matter of substance. The object of requiring the filing of the certificate is not merely to furnish evidence to the court which may as well be presented at the hearing. The certificate of arrival is the starting point for the investigation of the applicant and of the posting of public notice of the application. Unless it is filed with the petition and remains on file the full period before the hearing, one purpose of requiring it is defeated.

Naturalization courts have not the power to dispense with any of the steps specified by Congress merely because they may believe in particular cases that the requirements may safely be dispensed with.

II. Naturalization is illegally procured within the meaning of Section 15, if it definitely appears

that any of the substantial requirements of the law have not been complied with.

In *United States* v. *Ness, supra,* it was held that naturalization was illegally procured within the meaning of Section 15 where the certificate of arrival was never filed. The failure to file at the time specified by the Act is also a matter of substance.

The overwhelming weight of authority in the lower courts is that naturalization is illegally procured if there be a failure to comply with any substantial requirement of the Act.

The rule announced by some Federal courts that, to be illegally procured, naturalization must be obtained by some "positive, affirmative act on the part of the procurer, and one of a sinister character" is not supported by anything in the statute and is directly opposed to the decisions in *United States* v. *Ginsberg,* 243 U. S. 472, and *United States* v. *Ness,* 245 U. S. 319.

III. If the case be one within the scope of Section 15, the fact that the United States appeared in the naturalization proceeding and opposed the naturalization on the ground asserted in the cancellation case, does not make the matter *res judicata.* Congress has not said that Section 15 may not be resorted to if the United States has appeared in the naturalization case. Section 11, authorizing appearance by the United States, is part of the same statute. If Congress had intended that Section 15

may not be resorted to where the United States has availed itself of Section 11 it would have so stated. The courts may not write such a qualification into Section 15. It has been held by this Court that Secton 15 gives a cumulative remedy. The point that *res judicata* is not available as a defense in a cancellation proceeding was squarely decided in *United States* v. *Ness*, 245 U. S. 319.

In *United States* v. *Ginsberg, supra*, the Court said:

> * * * every certificate of citizenship must be treated as granted upon condition that the Government may challenge it as provided in §14 and demand its cancellation unless issued in accordance with such requirements.

Although naturalization proceedings are judicial, as held in *Tutun* v. *United States*, 270 U. S. 568, Congress has power to provide that the defense of *res judicata* shall not be asserted in cancellation proceedings. That is in effect what it has done, and there is good reason for it. The remedy by appeal is not always complete. There is no right of appeal in some States from naturalization decrees in State courts. Naturalization proceedings are informal. The United States may not always have full opportunity to prepare, and it is represented by naturalization examiners. The records are often incomplete and the inquiry not thorough. Evidence to oppose naturalization is sometimes obtained only as a result of a naturalization hearing and at a later date. These are some rea-

sons why Congress intended that the United States in a cancellation proceeding could not be bound by the judgment in a naturalization case.

ARGUMENT

I

THE RULE OF STRICT AND NOT LIBERAL CONSTRUCTION IS TO BE APPLIED IN INTERPRETING THE NATURALIZATION ACT. THE REQUIREMENT THAT THE CERTIFICATE OF ARRIVAL SHALL BE FILED WITH THE PETITION IS ONE OF SUBSTANCE AND THE NATURALIZATION COURTS HAVE NO DISCRETION TO DISPENSE WITH IT

It was looseness in the administration of the previous naturalization laws that caused the enactment of the Act of 1906. That Act presents a clearly defined scheme for naturalization proceedings, and with precision outlines the steps which must be taken. So insistent was Congress that the requirement should be strictly followed that it provided that an alien "may be admitted to become a citizen of the United States in the following manner and not otherwise."

In speaking of the exactions of the statute in *United States* v. *Ginsberg*, 243 U. S. 472, 473, 474, 475, this Court said:

> Prior to 1906 "The Uniform Rule of Naturalization" authorized by the Constitution was found in the Act of 1802 and a few amendments thereto. This enumerated only general controlling principles. Grievous abuses having arisen, Congress undertook by the Act of June 29, 1906, c. 3592, 34 Stat. 596, to prescribe "and fix a uniform system

and a code of procedure in naturalization matters." Report Committee on Immigration and Naturalization, H. R. 1789, Feb. 26, 1906. This specifies with circumstantiality the manner ("and not otherwise") in which an alien may be admitted to become a citizen of the United States; what his preliminary declaration shall be; form and contents of his sworn petition to the court and witnesses by which it must be verified; form of oath to be taken in open court; necessary proof concerning residence, character, etc. The clerk is required to post notice of the petition with details concerning applicant, when final hearing will take place, names of witnesses by which alleged facts are to be established, etc. * * *

* * * * *

An alien who seeks political rights as a member of this Nation can rightfully obtain them only upon terms and conditions specified by Congress. Courts are without authority to sanction changes or modifications; their duty is rigidly to enforce the legislative will in respect of a matter so vital to the public welfare.

* * * * *

No alien has the slightest right to naturalization unless all statutory requirements are complied with; and every certificate of citizenship must be treated as granted upon condition that the Government may challenge it as provided in § 15 and demand its cancellation unless issued in accordance with such requirements. * * *

Among the requirements of the Act is one that the certificate of arrival must be filed with and attached to the petition at the time of filing the petition. After this is done the clerk is required to give public notice of the application, and a hearing is deferred until at least 90 days after the filing and posting. In the case at bar the certificate of arrival was not filed with the petition. The petition was filed November 13, 1923, and the certificate of arrival was filed December 3, 1923. The clerk evidently proceeded to give public notice of the petition before the certificate was filed. The naturalization was granted on February 11, 1924, only 70 days after the filing of the certificate, although the statute contemplates 90 days between the filing of the complete statutory petition and final action by the court.

In *United States* v. *Ness*, 245 U. S. 319, proceedings were instituted under Section 15 to cancel a naturalization certificate because of failure to file the certificate of arrival. While in that case the certificate was never filed, and in the present case it was filed before the hearing, the reasoning of the Court supports the judgment in this case. The contention was urged there that the certificate of arrival "is merely a form of proof which the naturalization court has power to dispense with for cause." The Court said (pp. 322–324):

> * * * The uses served by the certificate, the history of the provision and its relation

to other parts of the act show that this contention is unsound.

Section 1 requires that a registry be made of certain facts concerning each alien arriving in the United States; and that "a certificate of such registry with the particulars thereof" be granted to each alien. Section 5 requires clerks of court to give public notice of each petition for naturalization filed. Section 6 prohibits courts from taking final action upon any petition until 90 days after such notice has been given. That period is provided so that the examiners of the Bureau of Naturalization and others may have opportunity for adequately investigating whether reasons exist for denial of the petition. The certificate of arrival is the natural starting point for this investigation. It aids in ascertaining (*a*) whether the petitioner was within any of the classes of aliens who are excluded from admission by sections 2 and 38 of the Immigration Act of February 20, 1907, 34 Stat. 898; (*b*) whether he is among those who are excluded from naturalization under section 7 of the Naturalization Act—for political beliefs or practices; (*c*) whether he is the same person whose declaration of intention to become a citizen is also attached to the petition under section 4, subdivision second; (*d*) whether the minimum period of five years' continuous residence prescribed by section 4, subdivision fourth, has been complied with. The certificate of arrival is in practice deemed so im-

portant that in the regulations issued by the Secretary of Labor under section 28 "for properly carrying into execution the various provisions" of the act, the clerk of court is advised that he "should not commence the execution of the petition until he has received the certificate of arrival."

Filing the certificate of arrival being a matter of substance, it is clear that no power is vested in the naturalization court to dispense with it. Section 4 declares: "That an alien may be admitted to become a citizen of the United States in the following manner and not otherwise." Section 27 declares: "That substantially the following forms shall be used in the proceedings to which they relate"; and the form of petition therein prescribed recites: "Attached hereto and made a part of this petition" is "the certificate from the Department of [Commerce and] Labor required by law." Experience and investigation had taught that the widespread frauds in naturalization, which led to the passage of the Act of June 29, 1906, were, in large measure, due to the great diversities in local practice, the carelessness of those charged with duties in this connection, and the prevalence of perjured testimony in cases of this character. A "uniform rule of naturalization" embodied in a simple and comprehensive code under federal supervision, was believed to be the only effective remedy for then existing abuses. And, in view of the large number of courts to which

> naturalization of aliens was entrusted and the multitude of applicants, uniformity and strict enforcement of the law could not be attained unless the code prescribed also the exact character of proof to be adduced. The value of contemporary documentary evidence was recognized; and the certificate of arrival was, therefore, specifically included among the prerequisites to naturalization. * * *

The object in requiring the filing of the certificate of arrival is not merely to furnish evidence to the court. If that had been the object the Act no doubt would have directed it to be filed at or before the hearing. The certificate of arrival is the basis of the whole inquiry as to the qualifications of the applicant. Congress intended that it should be filed with the petition, should be on file when public notice of the petition was given, and should be available as a basis for inquiry, either by the naturalization officials or by any citizen, during the full ninety-day period required to elapse between the filing and posting of the petition and the date of hearing.

The opinion in *United States* v. *Ness, supra,* makes it clear that the filing of the certificate with the petition and at the beginning of the proceeding was for a definite purpose.

If a naturalization court may allow the certificate to be filed after the petition is filed, it may grant naturalization where the certificate is not filed until the day of the hearing. If it may, in

its discretion, dispense with one requirement of the Act, it may dispense with others. It is not for a court to say in any particular case that such a requirement may be safely dispensed with. Naturalization courts should not be allowed the discretion to dispense with any of the substantial requirements of the Naturalization Act.

In the case of *In re Liberman*, 193 Fed. 301, on objection to the granting of naturalization because of failure to file the certificate with the petition, the court said ((p. 302):

> It is the opinion of the court that this objection must be sustained, and before the applicant can be admitted to citizenship it will be necessary for him to file a new petition, conforming to the requirements of the naturalization law of 1906. One of the provisions of the fourth section of that statute reads as follows:
>
> "At the time of filing his petition there shall be filed with the clerk of the court a certificate from the Department of Commerce and Labor, if the petitioner arrives in the United States after the passage of this act, stating the date, place, and manner of his arrival in the United States, and the declaration of intention of such petitioner, which certificate and declaration shall be attached to and made a part of said petition. 34 U. S. Stat., pt. 1, p. 597; U. S. Comp. St. Supp. 1907, p. 421; U. S. Comp. St. Supp. 1909, p. 479; F. S. A. Supp. 1909, p. 367; Pierce's Fed. Code, § 8295."

It appears by the petition filed by this applicant that his arrival in the United States was subsequent to the passage of this act, and the petition is deficient, because it lacks one of the prescribed essentials of a valid petition. The authority of courts to admit aliens to citizenship is conferred and limited by laws enacted by Congress, and all the provisions of law prescribing the procedure in the exercise of the authority are mandatory. The law requires every applicant for naturalization to file a petition with the clerk of a court authorized to act upon it. Until 90 days after the filing of such petition shall have elapsed, the court has no jurisdiction to admit him to citizenship. It is essential to the validity of a petition that it must be full and complete in the statement of facts which the law requires. It must be verified as the law prescribes, and there must be filed with it the applicant's preliminary declaration of intention; and if his immigration into the United States shall have been subsequent to June 29, 1906, there must also be filed the certificate from the Department of Commerce and Labor required by that part of the law above quoted. Said certificate and declaration must be filed at the time of filing the petition, and both must be attached to and made part of the petition. Congress, having taken the pains to prescribe these details, intended manifestly to impose conditions which the courts are not at liberty to ignore.

In *Ex Parte Eberhardt*, 270 Fed. 334, the petitioner filed with his petition a telegram "from Washington" to the effect that the certificate of arrival "was being sent forward by mail forthwith." This was held not to meet the statutory requirement of simultaneous filing, the court saying (pp. 335, 336):

> The requirements of law surrounding certificate of arrival matters were for a time very broadly construed. *In re Schmidt* (D. C.) 207 Fed. 678; *In re McPhee* (D. C.) 209 Fed. 143; *In re Pick* (D. C.) 209 Fed. 999; *In re Titone* (D. C.) 233 Fed. 175. But these cases have been deprived of any authority by the pronouncement of the Supreme Court of the United States in *United States* v. *Ness*, 245 U. S. 322. • • •
>
> • • • • •
>
> It is particularly to be noted that "at the time of filing his petition there shall be filed with the clerk of court," by the petitioner, the certificate of arrival called for by the statute. The same provision of law requires the candidate to make a part of his application, in the same manner, his declaration of intention. Where a valid declaration of intention is not attached to such a petition at the time of its filing, that fact renders the application void. *United States* v. *Moreno*, 245 U. S. 392, 38 Sup. Ct. 151, 62 L. Ed. 359. And the same rule prevails, as we have seen in the Ness Case, supra, where at the time of the execution of the petition, the same was not supported by a valid certificate of arrival. The fact that such a certificate was

in existence, on the date petition was executed, and that the same was being mailed to St. Louis from Washington, does not in any manner alter the situation. The statute is specific in its requirement that at the time of the execution of the petition the certificate of arrival needed must be in the hands of the clerk of the court, who is required to make the same an integral part thereof. A later attaching of such a certificate of arrival to a given petition does not meet the requirements of the law. Such petition is a nullity. It is not voidable, but is void. In the language of the *United States* v. *Martorana*, 171 Fed. 398, 96 C. C. A. 354, such a petition can not be validated by any subsequent process, "as in point of law there is nothing to amend by, and nothing to amend." In other words, no petition has in contemplation of law actually been executed. The court, in such a case, is without jurisdiction, as there is nothing legally before it that it can entertain.

* * * * *

Aliens have no right, inherent or statutory, to be admitted to membership in the body politic of the United States of America. Naturalization, then, being solely and entirely a political privilege extended by sovereign grace to aliens resident within the United States, Congress has undoubted authority under the Constitution to prescribe the terms and conditions upon which such privilege shall be granted. *In re Spitzer* (D. C.) 160 Fed. 138; *In re Buntaro* (D. C.)

163 Fed. 922; *In re Knight* (D. C.) 171 Fed. 301; *United States* v. *Spohrer* (C. C.) 175 Fed. 442; *Johannessen* v. *United States*, 225 U. S. 240, 32 Sup. Ct. 613, 56 L. Ed. 1066; *United States* v. *Ginsberg*, 243 U. S. 472, 37 Sup. Ct. 422, 61 L. Ed. 853; *United States* v. *Gulliksen*, 244 Fed. 727, 157 C. C. A. 175. The terms and conditions specified and prescribed by Congress respecting the grant to aliens of the favor or privilege of naturalization as citizens of the United States of America must be strictly construed and enforced, and aliens are bound to strictly meet and conform to these terms and conditions upon which alone the right they seek can be conferred. *Spitzer, Knight, Spohrer, Johannessen, Ginsberg,* and *Gulliksen Cases, supra; United States* v. *Nisbet* (D. C.) 168 Fed. 1006; *United States* v. *Martorana*, 171 Fed. 398, 96 C. C. A. 353; *United States* v. *Cohen*, 179 Fed. 835, 103 C. C. A. 28, 29 L. R. A. (N. S.) 829; *United States* v. *Peterson*, 182 Fed. 291, 104 C. C. A. 571; *United States* v. *Rodgers*, 185 Fed. 334, 107 C. C. A. 452; *United States* v. *Kolodner*, 204 Fed. 244, 124 C. C. A. 1; *In re Hollo* (D. C.) 206 Fed. 854; *United States* v. *Mueller*, 246 Fed. 679, 158 C. C. A. 635; and *United States* v. *Vogel* (C. C. A.) 262 Fed. 262.

It is made the duty by law of the Commissioner of Immigration at the port of entry to make such record of the arrival of each and every alien as will later permit such official to prepare from the official records of his office a certificate of arrival for use in naturaliza-

> tion purposes. Nothing short of a certificate prepared by such official, in the manner prescribed, will meet the requirements of the statute. A petition for naturalization, that was not at the time of its execution supported by a certificate of arrival fully meeting the terms of the act, is a mere nullity, and must be denied. * * *

To the same effect are—

> *In re Olsen*, 18 F. (2d) 425, 426.
> *In re Hollo*, 206 Fed. 852, 854.

Other instances of statutory requirements regarded as mandatory are the requirement of hearing in open court (*United States* v. *Ginsberg*, 243 U. S. 472); the requirement that witnesses be examined under oath by the court, such requirement not being satisfied by the introduction of depositions (*United States* v. *Leles*, 236 Fed. 784); the requirement of Section 11 as to the right of the United States to call witnesses (*United States* v. *Milder*, 284 Fed. 571, 572); the requirement that the petition be verified by two witnesses who are citizens of the United States, which is violated if one of such witnesses is an alien, so that the court may not permit, by amendment, the substitution of a new witness (*United States* v. *Martorana*, 171 Fed. 397); the requirement that the alien in his declaration shall renounce allegiance by name to the State or sovereignty of which he may be a citizen or subject, which is not satisfied by general renunciation (*Ex parte Lange*, 197 Fed. 769). In

holding *In re Friedl*, 202 Fed. 300, that a naturalization court is without power to permit amendment of declaration of intention, the court said (p. 302):

> The hardship resulting to the petitioner can not be relieved against merely because it may appear that the error is clerical, and not his own. If the power to amend is to be recognized at all, its exercise may well be invoked in every case where facts are presented disclosing reasonable excuse or meritorious grounds for the exercise of a discretion.

II

THE FAILURE TO FILE THE CERTIFICATE OF ARRIVAL WITH THE PETITION MAKES THE NATURALIZATION ONE ILLEGALLY PROCURED WITHIN THE MEANING OF SECTION 15, AUTHORIZING CANCELLATION PROCEEDINGS

It appearing that the naturalization court had no authority to dispense with the statutory requirement that the certificate of arrival shall be filed simultaneously with the filing of the petition, the next question is whether such a naturalization was illegally procured within the meaning of Section 15 of the Naturalization Act.

Federal courts have generally held that the words "illegally procured" mean "contrary to the provisions of the law," that is, procured without compliance with all statutory requirements. (*United States* v. *Ginsberg*, 243 U. S. 472; *United States* v. *Mulvey*, 232 Fed. 513, 519; *United States* v. *Koopmans*, 290 Fed. 545, 546; *United States* v. *Albertini*, 206 Fed. 133; *United States* v. *Shanahan*, 232 Fed. 169.)

In *United States* v. *Ness, supra,* the complete failure to file the certificate was held to make the naturalization one illegally procured within the meaning of Section 15. If the requirement that the certificate be filed with the petition is a matter of substance, as we have contended above, then the failure to comply with that requirement renders the naturalization one illegally procured as much as the entire failure to file it in the *Ness* case. There is nothing in the *Ness* case to suggest a distinction.

In *United States* v. *Koopmans,* 290 Fed. 545, 546, the words "illegally procured" are thus defined:

> The question of what is meant by "illegally obtained" has been discussed with great frequency, and is treated in all of the cases hereinbefore cited, and the weight of authority seems to be that "illegally" means contrary to the provisions of the law.

It may be that some errors which a naturalization court may commit may be reviewed by appeal, but not in cancellation proceedings under Section 15, and it has been said that mere irregularities in procedure do not make a case for cancellation of a certificate as illegally procured. Rulings as to the competency or weight of evidence, or credibility of witnesses, are also said to be not reviewable in proceedings under Section 15. *United States* v. *Milder,* 284 Fed. 571; *United States* v. *Shanahan,* 232 Fed. 169. Just where the line may be drawn need not be considered here. It should be held, at least, since Congress has provided that cer-

tain steps must be taken and has said expressly that naturalization should be granted after compliance with them, and not otherwise, that a naturalization is illegally procured where it definitely and clearly appears that some one of the substantial requirements of the Act have not been complied with. Certainly the phrase "illegally procured" is not limited in its application to cases where the applicant was ineligible. There is nothing in the Act to support the claim that the words "illegally procured" refer only to cases where the defect in the proceedings is "jurisdictional" in the ordinary sense, and authorities on the point that a judgment may only be set aside in an independent proceeding when void for want of jurisdiction are beside the mark.

The decisions of this Court support the contention that failure to comply with any of the substantial requirements of the Naturalization Act makes the naturalization one illegally procured within the meaning of Section 15. The Third Circuit has invented the rule that the words "illegally procured" mean "a positive, affirmative act on the part of the procurer, and one of a sinister character," and that the words cover a case "not an error of law, but subornation, or some other illegal means, to impose on the court." *United States* v. *Richmond*, 17 F. (2d) 28; *United States* v. *Srednik*, 19 F. (2d) 71. There is no support in the statute for such a rule, and it is directly in conflict with the decision of this Court in *United States* v. *Ness*,

supra, as it could hardly be said that the failure to file the certificate of arrival, as in that case, was some positive affirmative act of a sinister character committed by the applicant, in the nature of an imposition on the court.

Congress has not attempted to provide for appeals from naturalization decrees entered in State courts. In at least three States the State courts have held that the State laws do not provide for such appeals. If the right to assail naturalization certificates by proceedings under Section 15 is denied in cases where there has been a disregard of requirements of law by such State courts, the United States would have no remedy, unless through petition for certiorari to this Court under Sec. 237 (b) of the Judicial Code, and we shrink from adding to the number of those. Cases in the District Courts of the United States and in the United States Circuit Courts of Appeals as to what constitutes illegal procurement are collected in a note in United States Code Annotated, Title 8, Section 405, page 466.

III

IF A CANCELLATION PROCEEDING IS WITHIN THE SCOPE OF SECTION 15, THE DEFENSE OF RES JUDICATA IS NOT AVAILABLE AGAINST THE UNITED STATES BECAUSE OF ITS APPEARANCE IN THE NATURALIZATION CASE

Congress has not said that Section 15 may not be resorted to if the United States has appeared in the naturalization case and objected to the naturali-

zation on the ground asserted in the cancellation proceedings.

Section 11, authorizing appearances by the United States in naturalization cases is a part of the statute which contains Section 15. If Congress had intended that Section 15 may not be resorted to where the United States has availed itself of the right granted in Section 11 it would have so said The courts may not write such a qualification into Section 15. In *United States* v. *Ness, supra*, it was said:

> But in our opinion Section 11 and Section 15 were designed to afford cumulative protection against fraudulent or illegal naturalization.

In that case, where the cancellation proceedings were based on the failure to file the certificate of arrival, the defense of *res judicata* was interposed because of the appearance of the United States in the naturalization proceeding and its opposition to naturalization on the ground that the certificate of arrival was not filed, and this Court held that the plea of *res judicata* in the cancellation case could not be sustained. The point seems to have been squarely decided in that case.

In *Johannessen* v. *United States*, 225 U. S. 227, the point was mentioned but not decided.

In *United States* v. *Pandit*, 15 F. (2d) 285, the United States sought cancellation under Section 15 of a certificate granted to a Hindu. The Circuit Court of Appeals for the Ninth Circuit held in that

case that the appearance of the United States in the naturalization proceeding and its objection there to the naturalization on the ground of the applicant's race made the matter *res judicata*. Nowhere in the opinion in that case is the decision of this Court to the contrary in *United States* v. *Ness*, *supra*, referred to. The United States sought review of the Pandit decision on writ of certiorari, but its petition was denied. (273 U. S. 759.) There were circumstances in that case which may have induced the Court to exercise its discretion against the petition for the writ, but there is no occasion to speculate on that.

In *United States* v. *Carver*, 260 U. S. 482, 490, it was said:

> * * * The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times.

The United States Circuit Courts of Appeals for the Fourth, Eighth, and Second Circuits have held that matters litigated in naturalization proceedings are not *res judicata* in cancellation suits. *United States* v. *Ovens*, 13 F. (2d) 376; *United States* v. *Milder*, 284 Fed. 571; *United States* v. *Mulvey*, 232 Fed. 513. See also *United States* v. *Leles*, 236 Fed. 784 (D. C. Calif.); *United States* v. *Ali*, 20 F. (2d) 998 (D. C. Mich.).

The Court for the Second Circuit reiterated its conclusion in *Gokhale* v. *United States*, 26 F. (2d)

360, in a suit, as in the *Pandit* case, to cancel the certificate of a Hindu. The *Gokhale* case is pending here on petition for certiorari. (No. 361, October Term, 1928.)

In *Tutun* v. *United States*, 270 U. S. 568, it has been held that a naturalization proceeding is a judicial proceeding, and that there is a right of appeal by the applicant in the Federal courts, and the petitioner argues that therefore the doctrine of *res judicata*, which is common to judgments in judicial proceedings, is applicable here. We assume that the United States also has the right of appeal in naturalization cases in the Federal courts. Congress has power to provide that in a cancellation proceeding the United States may litigate the question whether naturalization was illegally procured, notwithstanding it may have appeared in the naturalization case and interposed an objection on the same ground, and it has so provided, in effect, when it authorized cancellation proceedings under Section 15 without regard to whether an appearance had been made in the naturalization case. The real question is whether the ground for attack on the certificate is within the scope of Section 15 and whether the naturalization is one illegally procured within the meaning of Section 15. If it is a case of illegal procurement, then Section 15 provides a method of reviewing the action of the naturalization court, notwithstanding the point may have been there litigated.

In *United States* v. *Ginsberg, supra*, it was said:

> * * * every certificate of citizenship must be treated as granted upon condition that the Government may challenge it as provided in § 15 and demand its cancellation unless issued in accordance with such requirements.

In *United States* v. *Ness, supra*, the naturalization had been granted in a State court, and attention is called to that fact in the opinion in *Tutun* v. *United States*, 270 U. S. 568, 580, but it can make no difference on the question as to *res judicata* whether the naturalization took place in a Federal court or a State court, or whether there is a right of appeal from a naturalization judgment as in the Federal courts and in some State courts, or whether the naturalization took place in a State court of Montana, California, or Washington, where the State courts have held that there is no right of appeal.

> *State ex rel Weisz* v. *District Court*, 61 Montana, 427.
>
> *In re Wilkie*, 58 Cal. App. 22.
>
> State *ex rel Gorelick* v. *Superior Court*, 75 Wash. 239.

Congress has not provided that if a right of appeal exists proceedings may not be had under Section 15 where the question has been raised in the naturalization case, and this Court has said the remedies by appeal (where that right exists) and under Section 15 are cumulative.

In *United States* v. *Owens*, 13 F. (2d) 376, 377, the *Tutun* decision was interpreted as follows:

> * * * In view of *Tutun* v. *United States*, 46 S. Ct. 425, 70 L. Ed. —, decided by the Supreme Court April 12, 1926, it is possible that the United States might have appealed from the order naturalizing him, in spite of the intimation or statement to the contrary in *United States* v. *Ness*, *supra*; and, of course, it is now certain that the appellee could have done so, had the lower court refused to admit him to citizenship. *Tutun* v. *United States*, *supra*; section 638, Consolidated Statutes of North Carolina 1919.
>
> It is well settled, however, that, when an order for naturalization has been illegally procured, the United States may, without appealing from it, file an independent bill in equity for the cancellation of the certificate.

In that case naturalization granted on a petition filed three months after the expiration of the seven years from the date of the declaration was held to have been illegally procured.

CONCLUSION

The requirement that the certificate of arrival shall be filed with the petition for naturalization is one of substance, which the courts have no discretion to dispense with. The naturalization was illegally procured within the meaning of Section 15 because granted without compliance with a substantial requirement prescribed by Congress, and

Section 15 contemplates that the question of illegal procurement may be there litigated, notwithstanding the same point may have been made by the United States in the naturalization proceeding.

It is respectfully submitted that the judgment should be affirmed.

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